TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 420

MERLIN W. HIXON, PLAINTIFF IN ERROR,

vs.

LOUIS D. OAKES

IN ERROR TO THE DISTRICT COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

FILED JULY 9, 1923

(29,730)

(29,730)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 420

MERLIN W. HIXON, PLAINTIFF IN ERROR,

vs.

LOUIS D. OAKES

IN ERROR TO THE DISTRICT COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

INDEX.

	Page
Record from district court of appeal for second appellate district	1
Petition for writ of habeas corpus	1
Exhibit A to Petition—Ordinance No. 37,699 of city of Los Angeles	13
Exhibit B to Petition—Eighteenth Amendment to Constitution	25
Exhibit C to Petition—Complaint before police court of Los Angeles	26
Return to writ	28
Exhibit C to Return—Complaint before police court of Los Angeles and ordinance No. 37,699 of city of Los Angeles	31
Writ of habeas corpus	44
Testimony of Dr. Melvin L. Moore	47
Dr. Dudley Fulton	60
Dr. Donald J. Frick	66

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1923

Page

Testimony of Dr. Rea Cowan 77
J. S. Carmen 81
Dr. John L. Smith 83
Opinion, Finlayson, P. J 91
Concurring opinion, Works, J 124
Assignment of errors 128
Prayer for reversal 132
Petition for writ of error 133
Order allowing writ of error 141
Bond on writ of error 142
Writ of error 145
Citation and service 147
Præcipe for transcript of record 148
Clerk's certificate 150

1 IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

IN THE MATTER OF THE APPLICATION OF M. W. HIXSON FOR A WRIT OF HABEAS CORPUS,	PETITION.

To the Honorable District Court of Appeal of the State of California, Second Appellate District:

2 Your petitioner, M. W. Hixson, complaining, alleges that he is unjustly and unlawfully detained and imprisoned by one L. D. Oakes, chief of police of the city of Los Angeles, at the city jail in said city, by virtue of a judgment of the police court of said city of Los Angeles, rendered against your petitioner, in support of which application your petitioner alleges as fol-

3 lows:

I.

That at all times hereinafter mentioned, the said L. D. Oakes was and still is the duly appointed and acting chief of police of the City of Los Angeles, in the county of Los Angeles, state of California, and that as such chief of police he has charge and custody of all of the prisoners confined in the city jail of the city of Los Angeles under penal sentence for a violation of any ordinance of said city.

4 II.

That on the 20th day of November, 1917, at a special municipal election, there was submitted to the vote of the qualified electors of the city of Los Angeles, pursuant to the provisions of the charter of the said city, an ordinance designated as Ordinance No. 37,699 (New Series); and that on said day said ordinance was adopted by the vote of more than a majority of the qualified electors of said city voting
5 thereon at said election.

That pursuant to Section 14 of said ordinance, it became effective as an ordinance of the city of Los Angeles, at twelve o'clock midnight on the 31st day of March, 1918.

That a full, true and correct copy of said Ordinance No. 37,699 (New Series) is hereto attached, expressly made a part of this petition by reference, and is designated as "Exhibit A."

6 III.

That by the terms of said Ordinance No. 37,699 (New Series) enacted as aforesaid, the establishment, maintenance, or conduct of any saloon, bar room, wholesale liquor establishment, malt bottling liquor establishment, brewery, winery, hotel, cafe, restaurant, club, association, or other place in which or in connection with which alcoholic liquor was sold, served or given away, was made unlawful, except as in

the other provisions of said ordinance expressly permitted.

That by the terms of said ordinance it was expressly provided, however, that the service of alcoholic liquors in a private home to members of the family or to guests was permitted and it was likewise provided that the use of wine should be permitted for sacramental purposes and that vinous and malt alcoholic liquors might be sold under provisions expressly made in said ordinance; that there were many permissive features to said ordinance, by which the sale, dispensing and use of alcoholic liquors were permitted; and that it was expressly provided that prescriptions issued, signed and dated by duly licensed physicians might be filled at pharmacies, as more particularly described in Subdivision (c) of Section 5 of said ordinance, but except as in said provisions of Subdivision (c) of Section 5 of said ordinance, the sale, serving or giving away of alcoholic liquor at retail pharmacies within the city of Los Angeles was prohibited.

That the effect of the provisions of Section 2 of said ordinance and of Subdivision (c) of Section 5 of said ordinance, was to prohibit the sale, dispensing or filling of prescriptions of alcoholic liquors at pharmacies in an amount in excess of eight ounces for each prescription.

That by reason of the provisions of said Section 2 of said Ordinance No. 37,699 (New Series), and the provisions of Subdivision (c) of Section 5 of said ordinance, it became unlawful for any registered pharmacist or druggist to dispense, sell or fill any prescription for any kind of alcoholic liquor, whether otherwise lawful or not, in excess of eight ounces and that thereby the use of such prescriptions of many kinds of alcoholic liquors was rendered valueless.

IV.

That on or about the 29th day of January, 1919, an amendment to the Constitution of the United States of America was ratified by a vote of the legislatures of more than three-fourths of the various states of the United States, and by the terms of said amendment the same became effective after one year from the date of its ratification, and that on the 29th day of January, 1920, said amendment to the Constitution of the United States became of full force and effect as a part of the Constitution of the United States.

That said amendment was the eighteenth amendment proposed to the Constitution of the United States and ratified, and has since been popularly known as the Eighteenth Amendment to the Constitution of the United States.

13 That a full, true and correct copy of said Eighteenth Amendment to the Constitution of the United States is hereto attached, expressly made a part hereof by reference, and is designated as "Exhibit B".

That by virtue of the terms of the Eighteenth Amendment to the Constitution of the United States, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from
14 the United States and all territory subject to the jurisdiction thereof, for beverage purposes, has been prohibited. Thus, the terms of said Ordinance No. 37,699 (New Series), permitting the sale of alcoholic liquors, became invalid and inoperative by virtue of the fact that such terms were in violation of the Eighteenth Amendment to the Constitution of the United States.

V.

15 That your petitioner is not committed or detained by virtue of a lawful final judgment or a lawful order of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon any such lawful judgment or order. That the cause or pretense of such confinement or restraint of your petitioner, according to his understanding and belief, is as follows:

That your petitioner is engaged in the business of conducting a retail drug store in the

16 City of Los Angeles, County of Los Angeles, State of California, at and upon those certain premises designated as No. 3700 West Washington Street, in said City of Los Angeles; and that in connection with said business your petitioner fills the prescriptions of regularly licensed physicians for alcoholic liquors containing more than one half of one per cent of alcohol by volume. That your petitioner is a regularly licensed pharmacist under the laws of the State
17 of California, and is authorized to fill prescriptions of alcoholic liquors in pursuance of the provisions of the National Prohibition Act of the United States.

That the business of conducting a retail drug store is a lawful and proper business and that the filling of the prescriptions of licensed physicians for medical purposes is a proper and lawful vocation.

18 That on or about the 8th day of September, 1921, in the City of Los Angeles, aforesaid, your petitioner was arrested by one D. McD. Jones, a police officer of said City of Los Angeles, and thereafter was arraigned in the police court of said city of Los Angeles, and was charged in a complaint with then and there being a pharmacist and having unlawfully filled a prescription for one Gordon McDonald, which said prescription did then and there contain more than eight ounces of alcoholic liquor. That

said charge was made or attempted to be made under the terms of Section 2 and Subdivision (c) of Section 5, of said Ordinance No. 37,699 (New Series).

That a true copy of the complaint filed in said action in said police court in which the petitioner was so charged, is hereto annexed, expressly made a part of this application by reference, and is designated as "Exhibit C".

That thereafter, and on the said 8th day of September, 1921, your petitioner was arraigned in said police court and a demurrer to said complaint was interposed, which said demurrer was subsequently overruled. That this petitioner was thereafter, and on the 29th day of September, 1921, brought to trial in said court and after said trial was adjudged guilty as charged, and thereupon, in said police court of the City of Los Angeles, your petitioner was sentenced to pay a fine of one hundred dollars, or to serve one hundred days in the city jail of the City of Los Angeles, for default in the payment of said fine.

That thereupon your petitioner prosecuted his appeal to the Superior Court of the County of Los Angeles, from said judgment of the police court of the city of Los Angeles, and that on or about the 5th day of June, 1922, the said judgment of the police court of the city of Los Angeles was affirmed.

22

VI.

That your petitioner is now in the custody of the chief of police of the said city of Los Angeles, by virtue of said charge made in the complaint filed in said police court against him, a copy of which is hereto attached, and is designated as "Exhibit C"; that said charge is based upon the provisions of said Section 2 and Subdivision (c) of Section 5, of said Ordinance No. 37,699 (New Series), which said sections

23

and which said ordinance are invalid, ineffective, unconstitutional and void.

VII.

That said Ordinance No. 37,699 (New Series) is unconstitutional and void, because it is in violation of the terms of the Eighteenth Amendment to the Constitution of the United States, and in violation of the terms of the National Prohibition Act, (41 Statutes-at-large 305.)

24

That the terms of Subdivision (c) of Section 5 of said Ordinance No. 37,699 (New Series) became inoperative and invalid by reason of the unconstitutional provisions of said ordinance enacted and being in effect in conflict with the provisions of said Eighteenth Amendment to the Constitution of the United States and said National Prohibition Act.

VIII.

That the business of conducting a retail drug store and the incidental business of filling the

25 prescriptions of physicians is a lawful and essential business in every community. That the complaint filed in the police court of the city of Los Angeles and charging the petitioner as more particularly hereinbefore described, a copy of which complaint is hereto attached and designated as "Exhibit C", is invalid and does not state a public offense, for the reason that it is based upon the terms and provisions of said
26 Ordinance No. 37,699 (New Series), which said terms and provisions are void because they are in conflict with the provisions of the Eighteenth Amendment to the Constitution of the United States.

That the business of conducting a retail drug store necessarily embraces the filling of prescriptions written and prepared by physicians and surgeons, regularly licensed as such under the laws of the state of California. That the busi-
27 ness of filling prescriptions containing alcoholic liquors is adequately and completely regulated by the provisions of the National Prohibition Act of the United States of America. That under the provisions of said National Prohibition Act, your petitioner has been authorized to fill prescriptions *containg* alcoholic liquors in accordance with the terms and provisions of said Act.

IX.

That prescriptions containing alcoholic liquors have a definite medicinal value for certain purposes, and may not be prohibited. That they are used widely and commonly in many forms of treatment of human beings for disease, and particularly in the emergency treatment of certain diseases, and in like cases of accident. That the use of wines and malt liquors for tonic and medicinal purposes is widely approved and the use of whiskey and other distilled spirits is recognized as necessary and essential in emergency and in certain forms of medical treatment. That alcoholic liquors have for such purposes a definite medicinal value.

X.

That your petitioner is and has been at all of the times in this petition mentioned, the owner of a retail drug store at said location heretofore described, in the city of Los Angeles, and is licensed by the city of Los Angeles to conduct such a drug store, and that your petitioner is further licensed under the laws of the state of California, to practice pharmacy and to fill and compound prescriptions of physicians for medical purposes.

XI.

That the terms of said Ordinance No. 37,699 (New Series) are invalid and unconstitutional for the reason that they are in violation of the

31 provisions of the Eighteenth Amendment to the constitution of the United States, and that thereby the terms of Subdivision (c) of Section 5 of said ordinance have been rendered invalid and inoperative. That further, the said terms of Subdivision (c) of Section 5 are inoperative and void because they prohibit a legitimate business and the conduct of the same, lawfully, in accordance with existing regulations under the National Prohibition Act of the United States.

32 That further, said provisions of Subdivision (c) of Section 5 of said Ordinance No. 37,699 (New Series) are invalid and inoperative because they are in conflict with the provisions of the National Prohibition Act of the United States.

XII.

That the proceedings under said complaint filed in the police court against your petitioner,

33 and the subsequent judgment and fine with the alternative of imprisonment, are the only pretext or cause of said arrest and detention of your petitioner, and that said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in the facts and circumstances hereinbefore particularly set forth, to wit: That the terms of Section 2, and Subdivision (c) of Section 5 of Ordinance No. 37,669 (New Series) are void and unconstitutional, for the reasons hereinbefore set forth.

34 XIII.

This application is made directly to the District Court of Appeal, Second Appellate District, for the reason that the Superior Court of the County of Los Angeles, which court has like original jurisdiction to issue a writ of habeas corpus in the premises, has already decided and passed upon the legal issues herein involved, adversely to your petitioner.

XIV.

35 That no previous application for a writ of habeas corpus has been made to this court in regard to the same detention and restraint complained of in this application.

XV.

That the jurisdiction of the police court of the city of Los Angeles in entertaining said charge against this petitioner, and in finding this petitioner guilty of said charge, and in passing

36 judgment upon this petitioner, as more particularly hereinbefore alleged, was exceeded, and that the process upon which said arrest, restraint and detention of this petitioner has occurred is defective and void, for the reason that the complaint upon which the same is based does not state a public offense. That said process, even if proper in form, has been issued in a case not allowed by law in excess of the jurisdiction of the court, and upon a complaint not charging a public offense.

37 Wherefore, your petitioner prays that a writ of habeas corpus may be issued to the said L. D. Oakes, chief of police of the City of Los Angeles, and to any other officer or subordinate of said chief of police, commanding him to have the body of your petitioner, M. W. Hixson, before your Honorable Court at a time and place therein to be specified, to do and receive what shall then and there be considered concerning the said M. W. Hixson, your petitioner, and
38 that your petitioner be restored to his liberty, and that he be then discharged from custody. That pending the determination of this matter, your petitioner be admitted to bail. For such other and further order as may appear to be proper in the premises.

Dated this 13th day of June, 1922.

M. W. Hixson
Petitioner.

Ray E. Nimmo
39 Lloyd W. Moultrie
Attorneys for Petitioner.

EXHIBIT "A"

Ordinance No. 37,699.
(New Series)

An Ordinance prohibiting saloons; and prohibting the sale of distilled alcoholic liquors; and regulating the sale and service of vinous and malt alcoholic liquors, within the City of Los Angeles.

The Mayor and Council of the City of Los Angeles do ordain as follows:

Section 1. It shall be unlawful to establish, maintain or conduct within the City of Los Angeles any saloon, barroom, wholesale liquor establishment, malt bottling liquor establishment, brewery, winery, hotel, cafe, restaurant, club, association or other place, in which, or in connection with which alcoholic liquor is sold, served or given away, except as hereinafter provided. Each day that any such place is established, maintained or conducted shall constitute a separate offense.

Sec. 2. It shall be unlawful to sell, serve or give away any alcoholic liquor within the City of Los Angeles, except as hereinafter provided.

Sec. 3. It shall be unlawful within the City of Los Angeles to solicit any order for any alcoholic liquor; and it shall be unlawful to accept an order for any such liquor anywhere, except in a place where such liquor may legally be sold.

Sec. 4. It shall be unlawful to have, keep or maintain any alcoholic liquor in any place of public resort, or upon the premises of any club or association within the City of Los Angeles, other than a place where such liquor may legally be sold or served, provided that this shall not apply to the keeping of alcohol for scientific or mechanical purposes.

43 It shall also be unlawful for the proprietor or manager of any place of public resort, club or association where any alcoholic liquor may not legally be sold to permit therein the drinking of any such liquor.

Sec. 5. Nothing in the preceding sections of this ordinance shall be construed as rendering unlawful

(a) The service of alcoholic liquors in a private home to members of the family or to
44 guests, when such home is not a place of public resort, and when no money or other representative of value, or any valuable consideration, is, or is to be, given or received in return therefor;

(b) The distribution and use of wine at the sacramental service of any religious organization;

(c) The filling only, at pharmacies, on the date of issuance, but not the refilling, of pre-
45 scriptions calling for not to exceed eight ounces of alcoholic liquor each. Every such prescription shall be issued, signed and dated by a duly licensed physician, and shall have endorsed upon it by such physician the name and address of the person for whose use such prescription is made and the statement that in his opinion the liquor prescribed is required by such person as a medicine. No other form of prescription shall be deemed to be within the intent of this section. All alcoholic liquor so dispensed shall be

placed in corked or sealed bottles and delivered to the purchaser in the public room of the *pharmacy* or sent to any given address, but shall not be consumed on the premises where dispensed. All such prescriptions shall be kept on file for one year and open at all times to public inspection while the pharmacy is open for business;

(d) The sale of pure alcohol by registered pharmacists at pharmacies for scientific or mechanical purposes, but not for drinking; provided the pharmacist selling same shall keep a record of such sales in which shall be entered the date of the sale, the quantity sold, the purpose for which purchased, and the signature of the person purchasing same; such record to be kept at said pharmacy for at least one year, open to public inspection at all times during regular business hours;

(e) The sale between seven a. m. and six p. m. of any day, except a legal holiday, of not less than one-fifth of a gallon of vinous and malt alcoholic liquors in sealed or corked containers or closed packages at any place situated within the liquor zone described and bounded herein, the proprietor or manager of which place holds a valid license, obtained as is now or shall hereafter be provided by ordinance, authorizing the sale of such liquors, and all such containers or packages shall be marked with the name of the liquor contained therein,

and delivered to the purchaser or sent to any given address, within or without said liquor zone, but shall not be consumed on the premises where sold.

(f) The service of vinous and malt alcoholic liquors in any club, restaurant or hotel, situated within the liquor zone described and bounded herein, the proprietor or manager of which club, restaurant or hotel holds a valid license, obtained as is now or shall hereafter be provided by ordinance, authorizing the sale or service of such liquors at such place. Such service shall only be made to persons partaking of *bona fide* meals, for consumption with such meals, in a public or general dining room, to which dining room free access is allowed to all police and other peace officers at all times when such room is being used. Such service shall only be made in a dining room large enough and sufficiently furnished to accommodate twelve or more guests at one time, and so free from curtains, booths, or other obstructions that guests in one part of the room shall have clear view of guests in all other parts thereof. Such service shall only be made between the hours of eleven o'clock a. m. and nine o'clock p. m. of any day; and if the dining room of such club, restaurant or hotel is kept open after nine o'clock p. m. of any day, all bottles, glasses and other vessels containing alcoholic liquor shall be removed

from such dining room immediately after such hour of nine p. m.

(g) The sale of alcoholic liquors by wholesale drug store liquor establishments to registered pharmacists, when delivered at pharmacies and at no other place.

Sec. 6. The terms and conditions under which licenses to sell or serve vinous and malt alcoholic liquors with meals in clubs, restaurants and hotels within the City of Los Angeles shall be issued, and the terms and conditions under which licenses to sell such liquors within the City of Los Angeles, not to be consumed on the premises, shall be issued, shall be prescribed by ordinance; or by rules and regulations of the Board of Police Commissioners which are not in conflict with ordinances; provided, that

(a) Such licenses shall not authorize anything made unlawful by this ordinance;

(b) No license authorizing the service of vinous and malt alcoholic liquors with meals shall be issued to any person, firm, corporation or club, not holding at the time this ordinance goes into effect a valid license to conduct a hotel, restaurant or social club liquor establishment in the City of Los Angeles, until the total number of licenses authorizing service of such liquors with meals within said City has been reduced to one hundred (100). Thereafter no

such licenses in excess of one hundred (100) shall be issued;

(c) No license authorizing the sale of vinous and malt alcoholic liquors in sealed or corked containers or closed packages, and not to be consumed on the premises, shall be issued to any person, firm or corporation not holding at the time this Ordinance goes into effect a valid license to conduct a wholesale liquor establishment, brewery, malt bottling liquor establishment or winery, until the total number of licenses authorizing such establishments is reduced to seventy-five. Thereafter no such licenses in excess of seventy-five shall be issued.

Sec. 7. Nothing in this Ordinance shall be construed as putting any limitations, except such as are stated herein, upon the police power of the Mayor and Council, or of the Board of Police Commissioners.

Sec. 8. Upon the conviction of any person, or any member of any firm, or any officer, director or manager of any corporation, association or club holding a license to sell vinous and malt alcoholic liquors, or any agent of such person, firm, corporation, association or club, being convicted of violating any provision of this Ordinance, the license of such person, firm, corporation, association or club shall automatically be revoked, and shall thereupon be null and void.

Sec. 9. The term "alcoholic liquor" as used in this Ordinance shall include all spirituous, vinous and malt liquors and any other liquor or mixture of liquor which contains more than one-half of one per cent by volume of alcohol and which is not so mixed with other drugs as to prevent its use as a beverage.

The term "vinous and malt alcoholic liquors" as used in this Ordinance shall include all malted and fermented liquors which do not contain more than fourteen per cent. by volume of alcohol, and which do not contain any distilled spirits.

Sec. 10. The liquor zone as referred to herein shall be bounded and described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles River with a line parallel with and distant one hundred fifty (150) feet southerly, measured at right angles from the easterly prolongation of the center line of that portion of Seventh Street extending westerly of said official bed of the Los Angeles River; thence westerly along a line parallel with and distant one hundred fifty (150) feet southerly measured at right angles from said easterly prolongation and said southerly line of Seventh Street in all of its various courses to its intersection with a line parallel with and distant one hundred fifty (150) feet

61 southeasterly measured at right angles from the southeasterly line of San Pedro Street; thence southwesterly along said last mentioned parallel line and following along the same in all of its various courses to its intersection with a line parallel with and distant one hundred fifty (150) feet southwesterly measured at right angles from the southwesterly line of Ninth Street; thence northwesterly along said last mentioned parallel line and following along the same in all
62 of its various courses to its intersection with a line parallel with and distant one hundred fifty (150) feet northwesterly measured at right angles from the northwesterly line of Grand Avenue; thence northeasterly along said last mentioned parallel line and following along the same in all of its various courses to its intersection with a line parallel with and distant one hundred fifty (150) feet northeasterly measured
63 at right angles from the northeasterly line of Temple Street; thence southeasterly along said last mentioned parallel line and following along the same in all of its various courses to its intersection with a line parallel with and distant one hundred fifty (150) feet northwesterly measured at right angles from the northwesterly line of North Broadway; thence northeasterly along said last mentioned parallel line and continuing along the same in all of its various curves and courses to its intersection with the

southwesterly line of Fremont Gate Terrace Tract, as per map recorded in Book 7, page 87 of Maps, Records of Los Angeles County; thence northeasterly along a line parallel with the southeasterly line of said tract to its intersection with the center line of the official bed of the Los Angeles River; thence southerly along said last mentioned center line in all of its various curves and courses to its intersection with the northwesterly prolongation of the center line of that portion of North Main Street extending southeasterly of said official bed of the Los Angeles River; thence southeasterly along said last mentioned prolongation and along said center line of North Main Street in all of its various courses a distance of two thousand three hundred (2,300) feet to a point; thence southerly in a direct line to the northwesterly corner of Lot 1, Fremont Tract, as per map recorded in Book 10, page 169, of Maps, Records of Los Angeles County; thence south 0° 26′ east a distance of five hundred eighty-eight and seventy-five hundredths (588.75) feet to the southwesterly corner of Lot 14, said Fremont Tract; thence north 86° 31′ west a distance of two hundred fifty-five and eight hundredths (255.08) feet to a point; thence south 0° 26′ east a distance of sixty (60) feet to a point; thence westerly in a direct line to a point in the southeasterly line of Moulton Avenue distant

thereon six hundred forty-six and fifty hundredths (646.50) feet southwesterly from the southerly line of North Main Street; thence northeasterly along said southeasterly line of Moulton Avenue to its intersection with the southerly line of North Main Street; thence westerly along said southerly line of North Main Street in all of its various courses, to the northeasterly corner of Lot 6, Kuhrts Street Tract, as per map recorded in Book 25, page 65, Miscellaneous Records of Los Angeles County; thence southerly and parallel with the easterly line of Antonia Avenue a distance of two hundred fifty-five (255) feet to a point; thence westerly in a direct line to the southwesterly corner of Lot 22, said Kuhrts Street Tract; thence southwesterly in a direct line to the southeasterly corner of Lot 32, said Kuhrts Street Tract; thence westerly in a direct line to the southwesterly corner of said Lot 32; thence northerly along the westerly line of said Kuhrts Street Tract to its intersection with the southerly line of North Main Street; thence westerly along said southerly line of North Main Street in all of its various courses to the northeasterly corner of Block 1, Kuhrts Bridge Tract, as per map recorded in Book 25, page 93, Miscellaneous Records of Los Angeles County; thence westerly along the northerly line of said Block 1,

70 and the westerly prolongation thereof, to its intersection with the center line of the official bed of the Los Angeles River; thence southerly along said last mentioned center line to the point of beginning.

Sec. 11. All parts of Ordinances in conflict with this Ordinance are hereby repealed.

Sec. 12. In case any section or sections, or part of any section, of this Ordinance shall be found to be unconstitutional or invalid, the re-
71 mainder of the Ordinance shall not thereby be invalidated, but shall remain in full force and effect.

Sec. 13. Any violation of this Ordinance shall constitute a misdemeanor, and shall be punishable by a fine of not to exceed five hundred dollars ($500) or by imprisonment in the City Jail of Los Angeles for a period not to exceed six (6) months, or by both such fine and
72 imprisonment.

Sec. 14. This Ordinance shall be and become effective at twelve o'clock midnight, March 31, 1918.

I hereby certify that the foregoing ordinance was submitted for adoption to a vote of the qualified electors of the City of Los Angeles, pursuant to provisions of the Charter of the said City, at the special municipal election held in said City on Tuesday, November 20, 1917,

73 and that said ordinance was adopted by more than a majority of the qualified electors of said city voting thereon at said election.

CHAS. L. WILDE,
City Clerk of the City of Los Angeles.
11—28 1t

EXHIBIT "B"

EIGHTEENTH AMENDMENT.

74 Section 1. After one year from the ratification of this Article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

75 Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by Congress.

76 EXHIBIT "C"

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. M. W. HIXSON, 77 Defendant.	COMPLAINT

Personally appeared before me this 8 day of September, 1921, D. Mc. D. Jones of Los Angeles, who, first being duly sworn, complains and says: That on the.....day of September, 1921, in the City and in the County of Los Angeles, a misdemeanor was committed by M. W. 78 Hixson (whose true name is to affiant unknown), who at the time and place last aforesaid was then and there a pharmacist and located at 2700 West Washington Street in the said city of Los Angeles, did wilfully and unlawfully fill a prescription for Gordon McDonald, which prescription did then and there contain more than eight ounces of alcoholic liquor.

All of which is contrary to the forms of the Ordinances and Resolutions adopted and approved by the Municipal authorities of said city,

79 in such cases made and provided, and against the peace and dignity of the People of the State of California.

Said Complainant therefore prays that a warrant may be issued for the arrest of said defendant, (whose true name is to affiant unknown), and that he may be dealt with according to law.

D. Mc. D. Jones

80 Subscribed and sworn to before me this 8th day of September, 1921.

URBAN EMME

Clerk of the Police Court of Los Angeles City, in said County and State.

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

M. W. Hixson, being by me first duly sworn, deposes and says: That he is the petitioner in
81 the within entitled application for writ of Habeas Corpus; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

M. W. Hixson

82 Subscribed and sworn to before me this 13th day of June, 1922.

(L. S.) Ray E. Nimmo,

Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Filed Jun. 13, 1922. W. D. Shearer, clerk.

[TITLE OF COURT AND CAUSE.]

83 **Return to Writ.**

To the Honorable Frank J. Finlayson, Presiding Justice, and to the Honorable Associate Justices of the above entitled Court:

State of California,)
County of Los Angeles,) ss.
City of Los Angeles.)

LOUIS OAKS, Chief of Police of said City of Los Angeles, respectfully makes return to the annexed writ, as follows:

84 That at the time of the coming of the said writ to your respondent, he had the therein named M. W. Hixson in his custody and under his control, and was imprisoning him at the City Jail of said City of Los Angeles, in execution of a judgment of conviction of a misdemeanor theretofore made and entered in an action theretofore prosecuted in the Police Court of said City, wherein said M. W. Hixson was defendant, which judgment had not then, and

85 has not now been fully executed, and by virtue of a commitment theretofore issued out of said Police Court in said action, a copy of which commitment is hereto attached, and made a part of this return, and the original of which is exhibited to the Court upon the hearing thereof.

That at the time of the service of said writ there was delivered to your respondent an order of your Honorable Court directing that pending the hearing of said writ, said M. W. Hixson be
86 set at liberty; that in accordance with such order your respondent did thereupon set said petitioner at liberty, for which reason he has not now before this Court the body of said petitioner, but nevertheless he has here the said writ as therein commanded.

That said petitioner was, at the time mentioned in said complaint, a copy of which is attached to his petition on file here as Exhibit
87 "B" thereto, a pharmacist and is engaged in the business of managing, carrying on and conducting a retail drug store in the said City of Los Angeles, where spirituous, vinous and malt alcoholic liquors containing more than one-half of one per cent of alcohol by volume were sold, distributed and given away for medical purposes upon a physician's prescription and as such filled a prescription for alcoholic liquors which contained more than eight ounces of alcoholic

88 liquor, contrary to the provisions of Ordinance No. 37,699, (New Series), of said City, a copy of which is attached to said petition as Exhibit "A" thereto, and in particular contrary to the provisions of Section 5, Subdivision C, of said ordinance; that said petitioner was so imprisoned upon and after the conviction of said offense.

The ordinance and the section which the petitioner is charged with violating is a valid and
89 subsisting ordinance of the City of Los Angeles. It is prohibitory in its character and consistent with all other ordinances of the City of Los Angeles, the laws of the State of California, the Constitution of the United States and all laws enacted by the Congress of the United States.

That the said ordinance is consistent and in harmony with the 18th Amendment of the Constitution of the United States and the so-called
90 Volstead Act, or Federal Enforcement Bill, enacted by the United States Congress for the purpose of carrying into effect the 18th Amendment.

That the said ordinance is a valid law exercised in pursuance of the police power. That similar ordinances have been considered both by the Appellate Courts and the Supreme Court of the State of California. That the validity of similar legislation has been upheld by the following cases:

91 *In re* Gust Pappas, 38 Cal. App. Dec.;
In re Teddy Pappas, 38 Cal. App. Dec. page 15;
In re John Tosello, 38 Cal. App. Dec. 61;
In re P. Polizzotto, 63 Cal. App. Dec. 65;
People vs. Cappelli, 36 Cal. App. Dec. 887;
People vs. Collins, 36 Cal. App. Dec. 386;
Ex parte Kinney, 200 Pac. Rep. 967;
Ex parte Volpi, 199 Pac. Rep. 1090;
Ex parte Cruikshank, 269 Fed. 980;
92 Wood vs. City of Seattle, 270 Fed. 315;
Ex parte Anixter, 166 Cal. 762;
In re Coombs, 169 Cal. 482;
People v. Velarde, 31 Cal. App. Dec. 217;
Crowley vs. Christensen, 137 U. S. 86.

Dated: 17 day of June, 1922.

L. D. Oakes,

Chief of Police of the City of Los Angeles, County of Los Angeles, State of California.

93 EXHIBIT "C"

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	:	
- vs -	:	COMPLAINT.
M. W. HIXSON, Defendant.	:	

Personally appeared before me this 8th day of September, 1921, M. Mc. D. Jones of Los

Angeles, who, first being duly sworn, complains and says: That on the .....day of September, 1921, in the City and in the County of Los Angeles, a misdemeanor was committed by M. W. Hixson (whose true name is to affiant unknown), who at the time and place last aforesaid was then and there a pharmacist and located at 2700 West Washington Street in the said city of Los Angeles, did wilfully and unlawfully fill a prescription for Gordon McDonald, which prescription did then and there contain more than eight ounces of alcoholic liquor.

All of which is contrary to the forms of the Ordinances and Resolutions adopted and approved by the Municipal authorities od said city, in such cases made and provided, and against the peace and dignity of the People of the State of California.

Said Complainant therefore prays that a warrant may be issued for the arrest of said defendant, (whose true name is to affiant unknown, and that he may be dealt with according to law.

Subscribed and sworn to)
before me this 8th day of) D. Mc. D. Jones
September, 1921.

URBAN EMME

Clerk of the Police Court of Los Angeles City,
in said County and State.

97 Ordinance No. 37,699
(New Series)

An Ordinance prohibiting saloons; and prohibiting the sale of distilled alcoholic liquors; and regulating the sale and service of vinous and malt alcoholic liquors, within the City of Los Angeles.

The Mayor and Council of the City of Los Angeles do ordain as follows:

98 Section 1. It shall be unlawful to establish, maintain or conduct within the City of Los Angeles any saloon, barroom, wholesale liquor establishment, malt bottling liquor establishment, brewery, winery, hotel, cafe, restaurant, club, association or other place, in which, or in connection with which, alcoholic liquor is sold, served or given away, except as hereinafter provided. Each day that any such place is established, maintained or conducted shall con-
99 stitute a separate offense.

Sec. 2. It shall be unlawful to sell, serve or give away any alcoholic liquor within the City of Los Angeles, except as hereinafter provided.

Sec. 3. It shall be unlawful within the City of Los Angeles to solicit any order for any alcoholic liquor; and it shall be unlawful to accept an order for any such liquor anywhere, except in a place where such liquor may legally be sold.

Sec. 4. It shall be unlawful to have, keep or maintain any alcoholic liquor in any place of

100 public resort, or upon the premises of any club or association within the City of Los Angeles, other than a place where such liquor may legally be sold or served, provided that this shall not apply to the keeping of alcohol for scientific or mechanical purposes.

It shall also be unlawful for the proprietor or manager of any place of public resort, club or association where any alcoholic liquor may not legally be sold to permit therein the drinking of
101 any such liquor.

Sec. 5. Nothing in the preceding sections of this ordinance shall be construed as rendering unlawful

(a) The service of alcoholic liquors in a private home to members of the family or to guests, when such home is not a place of public resort, and when no money or other representative of value, or any valuable consideration, is,
102 or is to be, given or received in return therefor;

(b) The distribution and use of wine at the sacramental service of any religious organization;

(c) The filling only, at pharmacies, on the date of issuance, but not the refilling, of prescriptions calling for not to exceed eight ounces of alcoholic liquor each. Every such prescription shall be issued, signed and dated by a duly licensed physician, and shall have endorsed upon it by such physician the name and the address

of the person for whose use such prescription is made and the statement that in his opinion the liquor prescribed is required by such person as a medicine. No other form of prescription shall be deemed to be within the intent of this section. All alcoholic liquor so dispensed shall be placed in corked or sealed bottles and delivered to the purchaser in the public room of the *phamacy* or sent to any given address, but shall not be consumed on the premises where dispensed. All such prescriptions shall be kept on file for one year and open at all times to public inspection while the pharmacy is open for business;

(d) The sale of pure alcohol by registered pharmacists at pharmacies for scientific or mechanical purposes, but not for drinking; provided the pharmacist selling same shall keep a record of such sales in which shall be entered the date of the sale, the quantity sold, the purpose for which purchased, and the signature of the person purchasing same; such record to be kept at said pharmacy for at least one year, open to public inspection at all times during regular business hours;

(e) The sale between seven a. m. and six p. m. of any day, except a legal holiday, of not less than one-fifth of a gallon of vinous and malt alcoholic liquors in sealed or corked con-

tainers or closed packages at any place situated within the liquor zone described and bounded herein, the proprietor or manager of which place holds a valid license, obtained as is now or shall hereafter be provided by ordinance, authorizing the sale of such liquors, and all such containers or packages shall be marked with the name of the liquor contained therein, and delivered to the purchaser or sent to any given address, within or without said liquor zone, but shall not be consumed on the premises where sold.

(f) The service of vinous and malt alcoholic liquors in any club, restaurant or hotel, situated within the liquor zone described and bounded herein, the proprietor or manager of which club, restaurant or hotel holds a valid license, obtained as is now or shall hereafter be provided by ordinance, authorizing the sale or service of such liquors at such place. Such service shall only be made to persons partaking of *bona fide* meals, for consumption with such meals, in a public or general dining room, to which dining room free access is allowed to all police and other peace officers at all times when such room is being used. Such service shall only be made in a dining room large enough and sufficiently furnished to accommodate twelve or more guests at one time, and so free from curtains, booths, or other obstructions that guests in one part of the room shall have clear view

of guests in all other parts thereof. Such service shall only be made between the hours of eleven o'clock a. m. and nine o'clock p. m. of any day; and if the dining room of such club, restaurant or hotel is kept open after nine o'clock p. m. of any day, all bottles, glasses and other vessels containing alcoholic liquor shall be removed from such dining room immediately after such hour of nine p. m.

(g) The sale of alcoholic liquors by wholesale drug store liquor establishments to registered pharmacists, when delivered at pharmacies and at no other place.

Sec. 6. The terms and conditions under which licenses to sell or serve vinous and malt alcoholic liquors with meals in clubs, restaurants and hotels within the City of Los Angeles shall be issued, and the terms and conditions under which licenses to sell such liquors within the City of Los Angeles, not to be consumed on the premises, shall be issued, shall be prescribed by ordinance; or by rules and regulations of the Board of Police Commissioners which are not in conflict with ordinances; provided, that

(a) Such licenses shall not authorize anything made unlawful by this ordinance;

(b) No license authorizing the service of vinous and malt alcoholic liquors with meals shall be issued to any person, firm, corporation or club, not holding at the time this ordinance

goes into effect a valid license to conduct a hotel, restaurant or social club liquor establishment in the City of Los Angeles, until the total number of licenses authorizing service of such liquors with meals within said City has been reduced to one hundred (100). Thereafter no such licenses in excess of one hundred (100) shall be issued;

(c) No license authorizing the sale of vinous and malt alcoholic liquors in sealed or corked containers or closed packages, and not to be consumed on the premises, shall be issued to any person, firm or corporation not holding at the time this Ordinance goes into effect a valid license to conduct a wholesale liquor establishment, brewery, malt bottling liquor establishment or winery, until the total number of licenses authorizing such establishments is reduced to seventy-five. Thereafter no such licenses in excess of seventy-five shall be issued.

Sec. 7. Nothing in this Ordinance shall be construed as putting any limitations, except such as are stated herein, upon the police power of the Mayor and Council, or of the Board of Police Commissioners.

Sec. 8. Upon the conviction of any person, or any member of any firm, or any officer, director or manager of any corporation, association or club, holding a license to sell vinous and malt alcoholic liquors, or any agent of such person, firm, corporation, association or club,

being convicted of violating any provision of this Ordinance, the license of such person, firm, corporation, association or club shall automatically be revoked, and shall thereupon be null and void.

Sec. 9. The term "alcoholic liquor" as used in this Ordinance shall include all spirituous, vinous and malt liquors and any other liquor or mixture of liquor which contains more than one-half of one per cent by volume of alcohol and which is not so mixed with other drugs as to prevent its use as a beverage.

The term "vinous and malt alcoholic liquors" as used in this Ordinance shall include all malted and fermented liquors which do not contain more than fourteen per cent. by volume of alcohol, and which do not contain any distilled spirits.

Sec. 10. The liquor zone as referred to herein shall be bounded and described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles River with a line parallel with and distant one hundred fifty (150) feet southerly, measured at right angles from the easterly prolongation of the center line of that portion of Seventh Street extending westerly of said official bed of the Los Angeles River; thence westerly along a

line parallel with and distant one hundred fifty (150) feet southerly measured at right angles from said easterly prolongation and said southerly line of Seventh Street in all of its various courses to its intersection with a line parallel with and distant one hundred fifty (150) feet southeasterly measured at right angles from the southeasterly line of San Pedro Street; thence southwesterly along said last mentioned parallel line and following along the same in all of its various courses to its intersection with a line parallel with and distant one hundred fifty (150) feet southwesterly measured at right angles from the southwesterly line of Ninth Street; thence northwesterly along said last mentioned parallel line and following along the same in all of its various courses to its intersection with a line parallel with and distant one hundred fifty (150) feet northwesterly measured at right angles from the northwesterly line of Grand Avenue; thence northeasterly along said last mentioned parallel line and following along the same in all of its various courses to its intersection with a line parallel with and distant one hundred fifty (150) feet northeasterly measured at right angles from the northeasterly line of Temple Street; thence southeasterly along said last mentioned parallel line and following along the same in all of its various courses to

its intersection with a line parallel with and distant one hundred fifty (150) feet northwesterly measured at right angles from the northwesterly line of North Broadway; thence northeasterly along said last mentioned parallel line and continuing along the same in all of its various curves and courses to its intersection with the southwesterly line of Fremont Gate Terrace Tract, as per map recorded in Book 7, page 87 of Maps, Records of Los Angeles County; thence northeasterly along a line parallel with the southeasterly line of said tract to its intersection with the center line of the official bed of the Los Angeles River; thence southerly along said last mentioned center line in all of its various curves and courses to its intersection with the northwesterly prolongation of the center line of that portion of North Main Street extending southeasterly of said official bed of the Los Angeles River; thence southeasterly along said last mentioned prolongation and along said center line of North Main Street in all of its various courses a distance of two thousand three hundred (2,300) feet to a point; thence southerly in a direct line to the northwesterly corner of Lot 1, Fremont Tract, as per map recorded in Book 10, page 169, of Maps, Records of Los Angeles County; thence south 0° 26′ east a distance of five hundred eighty-eight and seventy-five hundredths (588.75) feet

to the southwesterly corner of Lot 14, said Fremont Tract; thence north 86° 31′ west a distance of two hundred fifty-five and eight hundredths (255.08) feet to a point; thence south 0° 26′ east a distance of sixty (60) feet to a point; thence westerly in a direct line to a point in the southeasterly line of Moulton Avenue distant thereon six hundred forty-six and fifty hundredths (646.50) feet southwesterly from the southerly line of North Main Street; thence northeasterly along said southeasterly line of Moulton Avenue to its intersection with the southerly line of North Main Street; thence westerly along said southerly line of North Main Street in all of its various courses, to the northeasterly corner of Lot 6, Kuhrts Street Tract, as per map recorded in Book 25, page 65, Miscellaneous Records of Los Angeles County; thence southerly and parallel with the easterly line of Antonia Avenue a distance of two hundred fifty-five (255) feet to a point; thence westerly in a direct line to the southwesterly corner of Lot 22, said Kuhrts Street Tract; thence southwesterly in a direct line to the southeasterly corner of Lot 32, said Kuhrts Street Tract; thence westerly in a direct line to the southwesterly corner of said Lot 32; thence northerly along the westerly line of said Kuhrts Street Tract to its intersection with the south-

erly line of North Main Street; thence westerly along said southerly line of North Main Street in all of its various courses to the northeasterly corner of Block 1, Kuhrts Bridge Tract, as per map recorded in Book 25, page 93, Miscellaneous Records of Los Angeles County; thence westerly along the northerly line of said Block 1, and the westerly prolongation thereof, to its intersection with the center line of the official bed of the Los Angeles River; thence southerly along said last mentioned center line to the point of beginning.

Sec. 11. All parts of Ordinances in conflict with this Ordinance are hereby repealed.

Sec. 12. In case any section or sections, or part of any section, of this Ordinance shall be found to be unconstitutional or invalid, the remainder of the Ordinance shall not thereby be invalidated, but shall remain in full force and effect.

Sec. 13. Any violation of this Ordinance shall constitute a misdemeanor, and shall be punishable by a fine not to exceed five hundred dollars ($500) or by imprisonment in the City Jail of Los Angeles for a period not to exceed six (6) months, or by both such fine and imprisonment.

Sec. 14. This Ordinance shall be and become effective at twelve o'clock midnight, March 31, 1918.

130 I hereby certify that the foregoing ordinance was submitted for adoption to a vote of the qualified electors of the City of Los Angeles, pursuant to provisions of the Charter of said City, at the special municipal election held in said City on Tuesday, November 20, 1917, and that said ordinance was adopted by more than a majority of the qualified electors of said city voting thereon at said election.

CHAS. L. WILDE,

131 City Clerk of the City of Los Angeles.

11—28 1t

HABEAS CORPUS

STATE OF CALIFORNIA }
} ss.
COUNTY OF LOS ANGELES }

In the District Court of Appeal in and for the Second District, State of California, Division 2.

132 THE PEOPLE OF THE STATE OF CALIFORNIA,

To L. D. OAKES, Chief of Police of the City of Los Angeles, Greeting:

We command you, That you have the body of M. W. Hixson, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said M. W. Hixson shall be called, or charged, before this court at its court-

133 room in the Pacific Finance Building, in the City of Los Angeles, County of Los Angeles, State of California on the 19th day of June, A. D. 1922, at 10 o'clock A. M., of that day, to do and receive what shall then and there be considered concerning the said M. W. Hixson. And have you then and there this writ.

By order of the Court.

Witness, the Hon. Frank G. Finlayson, Presiding Justice of the District Court of Appeal
134 in and for the Second District, Division 2, aforesaid, with the seal thereof hereunto affixed, this 13 day of June, A. D. 1922.

(Seal) W. D. Shearer, *Clerk.*

Endorsed: Filed June 19, 1922. W. D. Shearer, clerk; by H. C. Lillie, deputy.

[TITLE OF COURT AND CAUSE.]

June 22, 1922.

135 For Petitioner: Ray E. Nimmo.

For Respondent: S. W. Odell, J. Friedlander, J. D. Taggart.

Mr. Nimmo: In this case we have the witnesses here, as suggested by the court, and if Your Honors desire to hear the testimony we are ready to proceed.

Finlayson, P. J.: I might state that it ought not to take but a very few minutes to put in this evidence. Whether it is material or not is a question of law.

136 Works, J.: The legal questions involved as to the admissibility of evidence may be later determined.

Mr. Friedlander: Yes.

Finlayson, P. J.: Now under the Volstead Act a person may have a prescription filled once in ten days - - -

Mr. Friedlander: Sixteen ounces.

Finlayson, P. J.: It will be conceded by counsel on both sides, will it not, that although the
137 city ordinance places no limitation upon the number of times one may purchase eight ounces, yet not more than eight ounces could be obtained in this city within ten days.

Mr. Nimmo: Yes.

Mr. Odell: No, we don't concede that. It is not the law, in our opinion.

Works, J.: That matter can be considered in the final briefs.

138 Finlayson, P. J.: But you will have to interrogate your witnesses upon the theory that that is the law.

Mr. Taggart: I believe the Volstead Act provides that not more than that amount of liquor shall be obtained in that period. It doesn't provide as to whether it might be divided into smaller items at different times.

Mr. Nimmo: That's a matter of argument; but there are so many regulations upon that point that its practical effect is that there can

139 be only one prescription in ten days, and that prescription limited to eight ounces. The whole thing can be presented in the briefs.

Finlayson, P. J.: The other side claims that it is possible for one under the city ordinance to - - -

Mr. Odell: We claim they can obtain eight ounces on any prescription without limitation, because the Volstead Act - - where the city ordi-
140 nance is in force the city ordinance takes precedence.

Works, J.: But the Volstead Act is more strict as to the time limit. It seems that had better be left open until final argument.

DR. MELVIN L. MOORE

being first duly sworn as a witness in behalf of the Petitioner, testified as follows:

DIRECT EXAMINATION.

141 By Mr. Nimmo: Q. Will you state your educational qualifications? A. I am a graduate of Rush College and Bellview College, New York.

Q. As a physician and surgeon. And you have practiced in this city for a great many years? A. Yes, sir.

Q. And you are engaged in the general practice of medicine and surgery? A. Yes.

Finlayson, P. J.: Can't you stipulate as to the qualifications of the witnesses on both sides?

142 Mr. Nimmo: I think so.

Mr. Friedlander: Yes. We will stipulate as to Dr. Moore.

Finlayson, P. J.: The ordinary rule is that a mere showing of a license to practice qualifies them.

Mr. Taggart: It goes to the weight of opinion.

Mr. Nimmo: Q. You are familiar with the terms of the Volstead law as they are now en-
143 forced in the country with reference to the prescription of intoxicating liquors for medicinal purposes? A. Yes, sir.

Q. I will ask you whether or not in your opinion as a physician and surgeon intoxicating liquors, inclusive of spirituous and distilled liquors such as malt and fermented liquors such as wine, have a medicinal value, or value for medicinal purposes, upon human beings? A.
144 Yes, sir.

Q. I will ask you whether in the course of your practice you are accustomed to prescribing such liquors as whiskey? A. I am.

Q. Do you do it with reasonable frequency in the course of your practice where you treat patients whom you believe require it? A. Yes, sir.

Q. Will you state just briefly some of the cases that you feel require the use of whiskey

145 as a medicine. A. The cases that require it regularly are those cases of elderly people who have very weak hearts - - what we call myocarditis - - where the patient is old and the circulation is feeble, I give those patients whiskey; some require it regularly. There are other cases, like pneumonia, where we have a crisis to tide them past, that we give whiskey over a short period of time. But there are other cases,
146 like weak hearts from chronic asthma, that require liquor very regularly. Elderly people require it who have been accustomed to taking liquor all through their lives. They have become so accustomed to the effect of it that to take it from them, as I have seen personally - - I have seen them become very feeble, and in fact in a degree of danger. So those are the cases I usually prescribe most to.

Q. Then you have specialized very largely
147 in obstetrics? A. Yes, sir.

Q. I will ask you whether or not it is your custom from time to time, where you feel whiskey might be needed, to use it in those cases? A. Very seldom in obstetrics. There are cases of extreme weakness following a delivery that it could be used, but I rarely give liquor in obstetrics; I don't remember of giving it in a long while. There may be an occasional instance where a small amount of liquor to tide them over a period of weakness might be given.

148 Q. How about other cases of that kind -- surgical or emergency cases? A. There are times when, in shock, or in loss of blood -- in which a small amount of liquor might be given, just as an emergency, but not to be continued. There are other things you can give in those cases rather than liquor.

Q. Then the two cases or conditions that you describe as needing it in larger quantities are those involving asthma and the conditions
149 accompanying old age? A. Yes.

Q. Now doctor, whiskey, as you use it doctor, contains an alcoholic content of approximately fifty per cent? A. Yes.

Q. Then I will ask you about the use of wine for similar purposes -- if that is used and if it has a medicinal value. A. It has; but the percentage of alcohol being so small, the quantity to be *take* would be too much. In other
150 words, I don't think I have given a prescription more than three or four times in the past year for wine; it has always been for whiskey.

Q. But there are cases --- A. Yes, where people are accustomed to taking wine. The wine is like milk to them.

Q. Then the alcoholic content of wine is approximately fifteen to twenty-two per cent? A. Yes.

Q. Now I will ask you whether in your judgment in all cases where the prescription of alco-

151 holic liquor is necessary, and particularly prescriptions of whiskey, whether a prescription limited to eight ounces would be valueless in many instances.

Mr. Odell: That's leading, and I don't think it calls for that sort of opinion. He ought to make a statement of how much is given.

Finlayson, P. J.: The objection is overruled.

A. It would not be of any special value in
152 the case that I have cited. Eight ounces would not last in several of the cases that I am treating now. It wouldn't last but a few days, and that patient would be without the drug that I think they need; so I think it really would have very little value.

Finlayson, P. J.: You mean by that that eight ounces over a period of eight or ten days would not be sufficient? A. No, sir. In fact, a pint in some of these cases is not sufficient.
153 We should have the privilege of prescribing more in some cases.

Mr. Friedlander: Q. A pint is sixteen ounces? A. Yes.

Mr. Nimmo: Q. Then referring again to the prescriptions. Do you think as an alcoholic stimulant for medicinal purposes eight ounces would be of any value? A. No, sir.

Finlayson, P. J.: Would eight ounces of wine be of any value? A. Very small.

154 Q. And eight ounces of whiskey would have no special value? A. Yes. (sic)

Mr. Odell: It wouldn't be eight ounces in ten days, but would be twice that amount.

Finlayson, P. J.: That question will be briefed.

Mr. Nimmo: Q. I will ask you whether there are not cases where the prescription of sixteen ounces is necessary at one time - - that is, in a period of twenty-four hours, or some-
155 thing like that? A. No, I never give that much.

Q. Not as much as that? A. No.

Q. In asthma cases? A. No, I put my patient to sleep.

Q. There are cases where it is necessary in asthmatic cases and similar cases - - where very much larger amounts than sixteen ounces could be used. A. Yes. It depends largely on
156 whether the patient has been a habituate or accustomed to taking it. They have a greater tolerance. A person who is accustomed to drinking whiskey can take a large amount and you wouldn't get the same stimulating or intoxicating effect. But a patient with a condition of weakness, we wouldn't give them those large amounts of whiskey. You get a sedative effect. What we want is a stimulating effect. If you give too much liquor then you get the sedative effect, which you get from any - - any man who

157 has too much liquor in him, it is a sedative; but if you give it in medicinal doses you get the stimulating effect, which is the desire.

Works, J.: Q. Your testimony is this: If prescriptions of either eight or sixteen ounces could be filled successively, each one following the other, the prescriptions would be large enough; but if the limitation is of ten days, one prescription within that time, either of eight or sixteen ounces, would be insufficient - - - A.
158 In some cases it would be.

Mr. Nimmo: That's all.

CROSS-EXAMINATION

By Mr. Odell: Q. Now what is the usual dose you give a person, of whiskey, who is not accustomed to it? A. Not over a tablespoon full at one time. That would be a half ounce.

Q. And how often repeated? A. Several times in twenty-four hours. In an acute condi-
159 tion it is required regularly - -

Q. What acute condition have you in mind? A. Take an elderly person with myocarditis, which means a large, weak, flabby heart; a tablespoon full might have to be repeated every two, three or four hours, until you get the effect.

Q. Then you would cease as soon as you got the effect? A. Yes.

Q. And a tablespoon full is half an ounce? A. Yes.

160 Q. And you would have sixteen doses in eight ounces? A. Yes.

Q. Would it be necessary to give a man in that condition as many as sixteen doses? A. In ten days, yes.

Q. I am speaking about the acute condition. A. You might have to give sixteen doses inside of three days, if the condition demanded it.

Q. There is another medicine you can use? A. Yes; but I think whiskey, for the acute
161 emergency, gives you the quick results. We have strychnia and digitalis that we give even while giving whiskey.

Q. Many physicians use them exclusively, don't they, and don't use whiskey at all? A. I have never met them.

Q. What acute cases would you specify where you would use whiskey outside of heart trouble? A. For instance, I have a case now
162 - - an old lady eighty-two years old. I am satisfied that I am keeping that woman alive with whiskey. I have tried it. I have taken whiskey away from her and used drugs for an emergency when she couldn't breathe and had to be propped up in bed; but I have given that woman a tablespoon full of whiskey three times a day, and I have a hard time to make a pint last the ten days. In that case I believe I am prolonging the woman's life, and have done so for the past year.

163 Q. What trouble has she? A. It is senility, and she - -

Q. Is she addicted to alcohol? A. Not at all.

Q. How long have you had that treatment? A. She has been under my care for ten years, but it's only in the last two years that she has been feeble.

Q. You have been giving her that for two years? A. Up to the time of the Volstead Act
164 I didn't regulate it. Since then I have prescribed a pint every ten days.

Q. And she has become an alcoholic. A. No.

Q. Isn't it true that a person does become an alcoholic by the constant administration of small quantities? A. That's true with some people. I have drank alcohol all my life and it doesn't bother me.

165 Q. But it would take more alcohol to upset you than an ordinary person? A. I beg your pardon. You give me a glass of wine - - I have done it on an empty stomach - - and I am not an alcoholic.

Q. Isn't it true that constant use for even a year of a limited quantity will make an alcoholic out of a person? A. I suppose there is - - I suppose you can become a habituate to anything.

166 Finlayson, P. J.: Q. Define what you mean by an alcoholic. A. I understand an aocoholic is one who has created or developed a desire or a craving for it. Speaking of this particular case: Along towards the last of the ten days, when she probably has very little in the bottle, we have to cut it down--maybe a teaspoon full. Now you would be surprised that the effect on that woman's pulse is perceptible. She becomes soft and flabby and weak. But you
167 give her the proper amount and you don't have to increase it. As a rule those who are alcoholics take more; they keep increasing the amounts the same as the drug addicts. It takes more to produce certain results. I have found that a tablespoon full is quite sufficient to give the medical results that I want.

Mr. Odell: Q. The same as any poison. A. Yes.

168 Q. You can habituate your body to it until you could take a dose that would kill a person not used to it. A. Yes.

Q. Alcohol is the same way; it is a poison. A. No, I don't look upon it as such.

Q. Isn't it recognized now as such? A. I don't think so. You can drink enough of anything to make it a poison.

Q. What is alcohol? A. It is a product of fermentation.

169 Q. It is the excretion of a virile germ? A. It is a product of *fermentaion* of carbo-hydrates or starches.

Q. It is produced by a germ - - the excretion of a germ? A. No, it is the germ which causes fermentation.

Finlayson, P. J.: Q. Alcohol, if taken in sufficient quantities, produces the same result as any poison? A. Certainly.

Q. And it is a poison? A. Certainly.
170 Bread is a poison if you take too much of it.

Q. Many medicines are taken for medical purposes that are poison? A. Yes.

Mr. Odell: Q. And if it be the law - - if it be possible to prescribe eight ounces a day, the prescription would be ample for any purpose in medicine, would it not? A. Yes.

Q. If it be possible to prescribe eight ounces every five days only, would that suffice - - A.
171 Well, the view I have taken is that we shouldn't be restricted - - that is, honorable physicians.

Q. That might be true; but I am asking now whether it wouldn't be all right if you could only prescribe eight ounces in five days. A. Yes, that would practically be the same. The only thing is it makes it hard for the physician. If they have to prescribe - - -

Q. That point we will not have to deal with. Now in your opinion the medical effect, or benefit, of eight ounces, if possible to prescribe

172 it every five days, would be the same as prescribing sixteen ounces in ten days? A. Yes.

Q. Do you believe that the prescription of only eight ounces in ten days would so limit the quantity as to make it useless to prescribe it? A. Practically so.

Q. That is, in bad cases? A. Yes.

Q. Now in pneumonia you don't give that much do you? A. No. Usually in those acute cases we may not need it more than twenty-
173 four hours - - tiding them through the crisis.

Q. You practically confine it then to the aged people who need a stimulant or to people who have been habituated to it and who need it constantly? A. Yes.

Q. Well, then, as a matter of fact the purpose of limiting it is to prevent people from becoming alcoholics. If they stop using it they get over the need of it. A. No, sir, not in the
174 cases I am telling you.

Q. They used to send them to the Keeley Institute and cure them. A. I don't think I have ever made an alcoholic of any person I have treated.

Q. But there are other drugs or things you could give which would have the same building-up effect? A. You can use them in conjunction with it. You see, alcohol is not essentially a food, but it does have an active stimulating effect. It is what the chemists term a respira-

175 tory effect. It is oxidized in the system up to a certain amount. If you go beyond that it retards oxidation of the tissues and you get the sedative effect.

Works, J.: Q. Do you know of any other drug or medicine that can be substituted for alcohol in these cases you have spoken of with the same beneficial results? A. No, sir, I do not.

176 Mr. Odell: Q. Now you have difficulty also with opiates of other kinds with your patients? A. I don't have any trouble.

Q. You have opiate fiends to take care of? A. Very seldom.

Q. And it is necessary that a person becoming addicted to the use of opium or its kindred poisons should have it? A. Yes, those people are usually put in sanitariums and gradually treated.

177 Q. Do you prescribe for the benefit of those people when you find them? A. I report them.

Q. And do you consider that the law with regard to the use of opiates - - prescribing opiates for them - - that you ought to have the right to prescribe for them also?

Mr. Nimmo: Just a moment; I don't think - -

Mr. Odell: That's all.

Craig, J.: Q. With respect to alcoholics and the use of whiskey in such cases; I am not quite clear as to your statement concerning that - - as

178 to what you said concerning the use of whiskey when prescribed for those who are alcoholics. Do you class them as among the ones who must have a considerable quantity? A. No.

Craig, J.: I wasn't quite clear on that.

Works, J.: Your theory is that it ought to be taken from them and they ought not to have it at all, except that they should get it in the same quantities as these other people you refer to and who are likely to pass away without it?

179 A. Yes.

Mr. Nimmo: That's all.

Dr. DUDLEY FULTON

being first duly sworn as a witness in behalf of the petitioner, testified as follows:

Direct Examination

By Mr. Nimmo: Q. You are a physician and surgeon licensed to practice in this state?

180 A. Yes.

Q. And have practiced here a good many years? A. Yes, sir.

MR. NIMMO: Counsel will waive further examination?

Mr. Friedlander: Yes.

Mr. Nimmo: Q. You have heard the testimony of Dr. Moore? A. Yes, sir.

Q. And you are familiar with the regulations that are now imposed upon prescriptions of liquor under the Volstead law? A. Yes, sir.

181 Q. And also under the city ordinance limiting prescriptions to eight ounces? A. Yes, sir.

Q. And the provisions of the so-called Gandier ordinance of this city limiting prescriptions of all sorts to eight ounces -- A. Yes.

Q. I will ask you whether in your opinion the prescription of whiskey and other alcoholic stimulants is necessary from time to time? A. Yes, sir.

182 Q. And whether or not you have, in the course of your practice, found it necessary to prescribe alcohol for your patients? A. Yes, sir.

Q. I will ask you whether, then, the prescription of whiskey -- which I believe it will be stipulated has an alcoholic content of fifty per cent -- is essential in certain cases that you treat? A. I think it is.

183 Q. And whether or not a prescription of whiskey limited to eight ounces would be valueless in certain instances? A. Practically useless.

Q. And there isn't any substitute, in your judgment, that would have the same stimulative and beneficial effect as whiskey, for whiskey? A. In many cases there is nothing that will take its place.

CROSS-EXAMINATION

By Mr. Friedlander: Q. Is it your opinion that eight ounces of whiskey prescribed by a

184 physician to a patient whom you believe requires it is useless if you are able to prescribe for him every day? A. It is inadequate.

Q. Even one prescription of eight ounces every day? A. I think that would be adequate.

Q. In two days? A. Yes, I think so.

Q. Five days? A. I wouldn't say that.

Finlayson, P. J.: Q. In your opinion how many ounces a day, on an average, should be
185 prescribed in the general run of these cases in which you prescribed whiskey? A. In a case of pneumonia, with a person that's been more or less addicted to alcohol, I am very sure it will save life when nothing else will. In such a case one might need four or five ounces in a day. But in the average case of senility - - the loss of appetite in a senile person or inability to sleep - - I would think that about one ounce a day would be sufficient.

186 Finlayson, P. J.: Q. In the pneumonia cases where you give a dose of four or five ounces, over what period of time, in the general run of such cases, should that be prescribed? A. Three or four or five days.

Mr. Friedlander: Q. Then you believe it is more urgent in the case of old age than under any other circumstances? A. No, not more than in other cases; but it is urgent.

Q. When you prescribe alcohol for a person who is very old, an elderly person, is it for the

187 purpose of stimulating his heart? A. It is for their general well-being.

Q. It has no stimulating effect? A. The chief value of alcohol is the sedative effect.

Q. Then you prescribe, generally, alcohol for the sedative effect? A. It is the general effect - - effect upon the appetites and nerves.

Q. Would you say alcohol under those circumstances is a food or poison? A. A food.

188 Q. And when you prescribe it to a patient, except in pneumonia, it is a food? A. It is never a poison.

Q. You don't classify alcohol as a poison? A. All physiologists have demonstrated that alcohol up to a certain point is a food and taken excessively becomes detrimental.

Q. You contend alcohol is a medicinal agent? A. Yes.

Q. You have heard of the Pharmacopoeia - -
189 listings of the Medical Association? A. Yes.

Q. Do you know whether alcohol is listed as a medicinal agent? A. I really can't tell you that.

Mr. Friedlander: That's all.

RE-DIRECT EXAMINATION

By Mr. Nimmo: Q. A poison, generally speaking, is something which the body repels? A. A poison is detrimental to the body.

Q. There is a distinction between what is a

190 poison and a food. A poison is almost always repelled, is it not? A. Yes.

Finlayson, P. J.: Q. If a man dies from acute alcoholism, you would say he died as the result of poisoning? A. Yes.

Q. Then as I understand you, you classify alcohol as a food up to the point where it is beneficial? A. Yes.

Q. But if taken beyond that point it is then a poison? A. Yes, sir. It becomes detri-
191 mental.

Q. Then it has become a poison? A. Yes, I think it would be classified as a poison.

Works, J.: Q. You are stating that upon the same theory that Dr. Moore stated bread was a poison—that in the use of both up to a certain point they are not to be considered as a poison, but beyond that they are? A. I would compare it more to what he said about strychnia.

192 Finlayson, P. J.: Q. What is your definition of poison? A. A foreign agent introduced into the body to produce destruction or ill effects upon the body tissues.

Mr. Nimmo: Q. Doctor, it is true that all forms of food, even sugar, if taken excessively will produce a poisonous effect - - be detrimental to the tissues of the body? A. Yes.

Mr. Friedlander: Q. Then you would say that where alcohol is used for medical purposes

193 it isn't a poison, but only when used in excessive quantities it becomes a poison? A. Yes.

Q. You would liken it to any other food - - A. Any other drug.

Q. Or food, for that matter? A. Yes.

Q. If used in excess? A. Yes.

Craig, J.: Q. Is it possible to produce both a stimulating and sedative effect by the same administration? A. No. Technically I think alcohol acts always as a - - - - -

194 Q. That is as a sedative? A. Yes. Physiological chemistry show that alcohol never stimulates. It makes the heart beat faster because of removing the brakes from the heart, if you please, by stimulating inhibition; but it is never a stimulant.

Finlayson, P. J.: Q. It acts on the nerve centers? A. Yes; and while it may affect a man's talk, it does so by paralyzing inhibition - - 195 stimulating inhibition.

Q. Isn't it a fact that in a sense it is a temporary stimulant? A. It acts so, but merely by inhibition.

Works, J.: Q. It stimulates certain faculties through its action as a sedative upon the nerve centers? A. Yes.

Q. So that the stimulation is really secondary and not primary? A. Yes sir.

Finlayson, P. J.: Q. In other words, a diffident man might appear to be stimulated in

196 his talk because his diffidence is removed by paralyzing the nerve centers which produce such condition, and then he speaks with more confidence in himself? A. Yes sir.

Mr. Nimmo: That's all.

Finlayson, P. J.: It doesn't stimulate his courage but removes his cowardice.

Mr. Friedlander: I want to call one of my witnesses out of order.

Mr. Nimmo: Very well.

197

Dr. Donald J. Frick,

being first duly sworn as a witness on behalf of respondent, testified as follows:

Direct Examination

By Mr. Friedlander: Q. You are a regularly licensed physician and surgeon? A. Yes sir.

Q. I believe you are president of the County Medical Society of the county of Los Angeles?
198 A. Yes sir.

Q. How long have you been practicing, doctor? A. Twenty-three years.

Q. Have you had experience with administering alcohol to patients? A. Yes sir.

Q. You have heard discussed the possibilities or advisability of administering alcohol in certain cases. According to your experience do you think it is necessary, in order to get a

199 sedative effect, to prescribe alcohol, or what is known as whiskey? A. No sir.

Finalyson, P. J.: Is it ever advisable to do so, in your opinion? A. No sir.

Mr. Friedlander: Q. Is it practical? A. Yes, I suppose it is practical.

Q. Are there any other medical agents that you use in place of whiskey? A. Yes.

Q. I believe, doctor, you were connected with one of the training camps during the war?
200 A. Yes sir.

Q. Where at? A. Camp , Alexandria, La.

Q. At that particular place at the time or before you were connected with it did they use any alcohol A. Yes.

Q. And after you connected yourself with it did you continue using alcohol? A. Yes.

Q. In what contents was it used at the time
201 you connected with it? A. From ten to twelve quarts monthly.

Q. And in what quantity did you use it? A. We cut it down to a quart and a half for 1500 to 2000---

Mr. Nimmo: That question is so vague and uncertain.

Works, J.: Q. That's for all the men under your charge? A. Yes.

Q. And the number of men was the same before you were there and after? A. Yes.

202 Q. And the quantity was cut down in the way you have stated? A. Yes sir.

Finlayson, P. J.: Q. A large percentage of these men didn't require any medical stimulants at all? A. This was a base hospital - - very sick people.

Mr. Friedlander: Q. And with what results did you cut it down? A. The results were just the same - - perhaps better.

203 Q. How many men in the hospital? A. It averaged from 1500 to 2000 patients.

Q. What was the general afflication of those patients? A. Acute diseases of young men - - pneumonia, measles, mumps, meningitis, venereal cases of all kinds, and the results of pneumonia, and surgical cases of all types.

Q. You have enumerated the diseases in which you ordinarily prescribe whiskey - -

Finlayson, P. J.: Oh no. Measles?

204 The Witness: The usual prescription of alcohol is in pneumonia, and in the post-surgical cases in that type of men - - men from eighteen to thirty-one; and we carried it at all times there - - from seventy to two hundred of that type of cases. The measles caused a great many of those cases - - developed pneumonia; so they come within the classification or type of cases that might need alcohol.

Mr. Friedlander: Q. And in all these cases in what proportion have you cut down the dose

205 of alcohol, if at all? A. The whiskey was used in the pneumonia wards and in egg-noggs; and that was more or less under the discretion of the physician in charge of that ward.

Q. For the purposes for which you used alcohol would you say that eight ounces of alcohol would be ample to cure a patient, so to speak, or bring him through his sickness? A. I stated that I didn't use it.

206 Q. But it was used somewhat at this particular base hospital? A. That meant we were using about forty ounces for sixty or seventy pneumonia cases in a month.

Q. Forty ounces in a month for sixty cases? A. Yes.

Finlayson, P. J.: Q. In your opinion has alcohol any medical value? A. No sir.

Q. It has no medical value in any way? A. I don't use it.

207 Q. That's not the question. You are of the opinion that it has no medical value in any case? A. Yes.

Q. Is that opinion based largely upon your experience at the base hospital which you have spoken of? A. It is based upon my experience of twenty-two years of practice.

Works, J.: Q. And was that experience added to by your experience in that hospital? A. Yes.

208 Works, J.: Q. Your opinion is that alcohol has no value at all, and therefore there is no substitute for it for that reason. It isn't a case of substituting something else for alcohol but that - - A. I think there are different substitutes for alcohol, and that alcohol has some deleterious effect on sick people, and that it is better to use something else.

Q. Alcohol has a medicinal value, but also produces deleterious effects which would not
209 follow from the use of substitutes, and those substitutes would give the same beneficial effects? A. Alcohol, in my opinion, is a stimulant, and you can use it if you so desire; but there are other things that are safer and better.

Q. And will do the work as well or better? A. Yes.

Finlayson, P. J.: And that might mean that one physician would pick out one poison or drug
210 and another another.

Mr. Friendlander: Q. What are the substitutes for alcohol? A. Strychnia is one - - that is for immediate use; nitroglycerine and caffein, digitalis. Digitalis is too slow for immediate use; it hasn't any particular use for immediate stimulation.

Works, J.: Q. Ammonia? A. Yes.

Finlayson, P. J.: Q. Let me ask you: If none of these substitutes were available - - you couldn't procure any of these mentioned drugs - -

211 would you use whiskey in the case of pneumonia or in any other diseases where whiskey is sometimes used by other practitioners? A. No. You mean as - -

Q. Let us assume you are so circumstanced, you and your patient, that all of the substitutes for whiskey were not procurable - - you were on an island, for instance - - you couldn't obtain strychnia or nitroglycerine or caffein, but you
212 did have whiskey with you. Would you prescribe it? A. Yes, I would.

Q. Then it has, in and of itself, some medicinal value? A. Yes.

Q. But you think the substitutes for it are safer and better? A. Yes.

Mr. Friedlander: Q. You would say that the use of alcohol where other things are available is dangerous? A. Yes sir.

Q. I will ask you whether, in a community
213 like Los Angeles, any of these substitutes could be secured - -

Works, J.: Oh, I think we can take judicial notice of that.

Finlayson, P. J.: Yes. In a large city like Los Angeles all of those substitutes can be procured. We know that.

Mr. Friedlander: Q. What do you prescribe generally for old age, senility, etc. A. All depends upon what's the matter.

214 Q. Take the type of cases Dr. Moore talked about—eighty-two years old lady. A. Digitalis would carry her along just as well, in my opinion.

Finlayson, P. J.: The witness' position is this, as I understand it: Whiskey or alcohol has a medicinal value in some cases, but in his opinion there are substitutes that are better and safer. He and the other experts don't disagree as to whether alcohol has or has not a medicinal
215 value, but they disagree as to which medicine should be used—whether alcohol or digitalis or strychnine.

Mr. Odell: But it is his opinion that alcohol has a deleterious effect and therefore he don't use it.

(Argument.)

Finlayson, P. J.: I will withdraw all I have said.

216 Cross-Examination

By Mr. Nimmo: Q. Before you went to this base hospital there were other physicians in charge of the same? A. Yes, sir.

Q. And were you put in supreme control of it as the physician in charge? A. Yes.

Q. All other physicians were under your charge? A. No, I was chief of the medical service.

Q. Were the other physicians under your charge? A. Yes sir.

217 Q. And you say whiskey in certain quantities was used? A. Yes.

Q. And these patients were all largely young men in the army? A. Yes sir.

Q. There were no cases of senility or old age, nor any conditions of the heart resulting from senility? A. No sir.

Q. In addition to that you had a great many cases that did not involve the necessity of using stimulants at all? A. Yes sir.

218 Q. For instance, you mentioned mumps. Now you speak of having some surgical cases and pneumonia. Did you use whiskey in certain instances in those cases? A. Yes sir.

Q. And it was used with your sanction? A. Yes. It was used in this way: Our object all the time was to see how little whiskey we could use, and the men in charge of the pneumonia wards were told to cut it down as low as they

219 could in their judgment; and they were given the judgment to use it or not as they pleased.

Q. And that judgment was extended to them by you? A. Yes.

Q. And I understood you to state, in answer to the court, that it has some medical value in certain cases. Now assuming that within the judgment of the attending physician it was necessary to prescribe whiskey for any effect, stimulative or sedative, would, in your judg-

220 ment, eight ounces be sufficient to extend over a period of ten days? A. Yes sir.

Q. You think eight ounces would extend over ten days notwithstanding the fact that it might be an acute case? A. Yes sir.

Works, J.: Q. You think eight ounces would be enough in any case you can imagine? A. Yes.

Q. Within a period of ten days? A. Yes.

221 Q. That means without the use of any other substitute in that period? A. No.

Mr. Nimmo: Q. Now assuming that whiskey is the only thing that could be used, he couldn't get by ten days on eight ounces without using a substitute? A. No doctor has ever done that—used whiskey as the only drug.

Q. Dr. Moore testified to the effect that he used it accompanied by other drugs. A. Yes.

Q. Speaking of the use of digitalis or any
222 other drug, taken in excess it has a deleterious effect? A. Yes.

Q. And taken in quantities where the reaction of that drug is not necessary it has a deleterious effect? A. Yes.

Mr. Nimmo: That's all.

Finlayson, P. J.: Q. Some physicians believe whiskey or alcohol has a beneficial effect in some cases, such as pneumonia. You are satisfied that there are substitutes for alcohol which are more beneficial and less deleterious, and

223 therefore you prefer to use the substitutes. But if you were of the opinion, as some of the others are, that it was better to use alcohol, and you did use alcohol, would eight ounces in ten days be sufficient for your purpose in the case of the average pneumonia patient? A. I think so; if my knowledge of alcohol is correct.

Mr. Nimmo: Q. Would that apply in other cases than pneumonia? A. Yes sir.

Q. In all cases? A. Yes.

224 Q. Without a substitute for alcohol you could get by for that time on eight ounces? A. Without any other drug?

Q. Yes, without any other drug. If, in the judgment of the physician, that was proper, could you get by for that length of time on eight ounces?

Mr. Odell: That's an extreme case and not an ordinary case.

225 Finlayson, P. J.: Overruled.

A. As I stated before, nobody carries any case through on whiskey, so you could say that without any substitute you carried the case through.

Works, J.: It is not a supposable case, in your opinion? A. No sir.

Mr. Nimmo: Q. Dr. Moore testified that there was no substitute for whiskey for the purposes which he desired to use it. He said that other drugs were used with it. I want to as-

226 sume this case: That whiskey is being prescribed for the purposes that a physician believes it necessary in a case of this character - - myocarditis. Assuming that to be necessary within the judgment of the physician, would the quantity of eight ounces be sufficient to extend over a period of ten days? A. Yes sir. But nobody would treat myocarditis with whiskey alone.

227 Q. Assuming it was treated with other things? A. Yes, with other things eight ounces is adequate for ten days.

Works, J.: Q. And it is always used with other things? A. Yes.

Mr. Nimmo: That's all.

Mr. Friedlander: Q. I think you are in connection with the American Medical Association? A. Yes sir.

Q. And what has been their attitude in the
228 cure of those afflicted - -

Mr. Nimmo: That calls for an opinion - -

Finlayson, P. J.: It is not a proper question. You are asking for his judgment as to the views of other physicians.

Mr. Friedlander: They passed resolutions upon that point.

Works, J.: Then its not the best evidence.

Mr. Friedlander: That's all.

229 Dr. REA COWAN,

being first duly sworn as a witness in behalf of the Petitioner, testified as follows:

Direct Examination

By Mr. Nimmo: Q. You are a physician and surgeon? A. Yes.

Q. Licensed to practice in the state of California? A. Yes sir.

Q. And have been practicing in this city for
230 several years? A. Fourteen years.

Q. You have heard the general line of questions propounded to the preceding witnesses, including Dr. Moore? A. No, I have not. I just came in.

Q. I will ask you this general question: You do and have prescribed whskey in certain kinds of cases? A. Yes sir.

Q. And I will ask you whether in your judgment whiskey and wine and other alcoholic
231 stimulants have a medicinal value? A. Yes sir, they have.

Q. Assuming that fact, will you state whether or not the amount of a prescription confined to eight ounces in a period of ten days would be sufficient in certain cases to take care of the needs of a patient? A. In certain cases; not all cases.

Q. In certain cases it would not? A. Yes.

Q. In your judgment there are cases where

232 the prescription limited to eight ounces would not be sufficient to tide the patient over that period of time, where it is necessary to prescribe liquor? A. I think not.

Q. It would not? A. Yes.

Works, J.: Q. How about sixteen ounces over the same period of time; would that be sufficient to cover all cases? A. I don't think it would.

Cross Examination

233 By Mr. Odell: Q. You think you would prescribe more than sixteen ounces in ten days to any one patient? A. In special cases.

Q. What kind? A. Pneumonia.

Q. Does the crisis last ten days in which you would have to use that? A. There are several types of pneumonia. In lobe-pneumonia (?) you get the crisis from the ninth to the eleventh day.

234 Q. And it is on that day that you use the stimulant? A. We start using it before then.

Q. How long before that? A. I have had pneumonia and I know how they did it to me. How long before? A. At the *Rockafellow* Institute where I was during the war we started it at the same time we started the digitalis.

Q. Did your treatment of the ordinary pneumonia patient last over *give* days - - of whiskey? A. It did.

Q. Has it, in your experience? A. Yes sir.

235 Q. How much longer? A. Two weeks.

Q. You were using whiskey all the time. How much every day? A. Four ounces a day.

Q. Anything else used with it? A. Yes.

Q. What was that? A. Caffein.

Q. What was the result; did he get well or die? A. I have no special case in mind.

Q. In how many cases did you use that? A. I can recall a case.

236 Q. One case? A. Yes.

Q. Is there any other disease in which you use that quantity? A. Tuberculosis, where the paitent is very low.

Q. What quantity do you use there? A. Depends upon the case.

Q. Is that a stimulating or a toxic effect? A. Stimulative; also a nourishing effect.

Q. If you give a spoonfull or two it has a
237 stimulating effect? A. Yes sir.

Q. And more than that it has a stupefying effect? A. I would have to give it in considerable quantities to have that effect.

Q. What is the effect of alcohol upon the nerves? A. First an excitant, and then a - -

Q. Paralysis? A. No.

Q. Taken in quantities, a person becomes entirely void of the use of his nerves; he can't use his arms, head or feet? A. I wouldn't say

238 paralyzed. Paralyzed, as we usually use it in medicine, means something entirely different than what you mean.

Q. How soon after one takes a dose of alcoholic liquor does the alcohol get into the blood? A. I can't answer that.

Q. About ten minutes? A. I can't say.

Q. If you give a person in pneumonia a dose of alcohol how soon would the effects appear?
239 A. Within the first hour.

Q. What effect would it have? Stimulating? A. Depends upon how much you give. It might have more than a stimulating effect.

Q. Many physicians do not use it in pneumonia at all. A. Different doctors treat their cases entirely different. I agree with you that probably some - -

Q. Do you know of any physicians who do not use alcohol in that kind of a case? A. I do.
240 Q. Do you know whether it is listed in the United States Pharmacopoeia as a medicine?

Mr. Nimmo: I don't think that has any relevance.

Finlayson, P. J.: It is proper to ask an expert witness - -

A. I think it is listed. Whether it is in the official United States Pharmacopoeia I can't answer.

Q. Have you looked in the last edition issued by the government? A. How recently?

241 Q. Within the last three years? A. Yes sir.

Q. Have you examined it with regard to whether alcohol is listed as a medicine? A. I have not.

Q. You are not acquainted with that? A. No.

Q. Are you acquainted with the American Medical Society? A. I am a member.

Q. Did you attend its last meeting? A. No.

Q. Did you read a report of its actions?

242 Mr. Nimmo: Same objection. I don't see how a resolution of the American Medical Society has anything to do with the opinion of this physician.

Mr. Friedlander: It would have a great deal of weight. Same as if I would read the decisions of the court - -

Mr. Nimmo: That is entirely different.

Mr. Odell: That's all.

243 Finlayson, P. J.: You have exhausted your limit of experts.

Mr. J. S. Carmen,

being first duly sworn as a witness in behalf of the respondent, testified as follows:

Direct Examination

By Mr. Friedlander: Q. What is your business or occupation? A. Assistant chemist of the health department of Los Angeles.

244 Q. How long have you been engaged in chemistry? A. Twenty-five years.

Q. And are you familiar with the United States Pharmacopoeia? A. I am.

Q. You have constant reference to it? A. I do.

Q. Referring you to the most recent issue of that Pharmacopoeia, is whiskey listed as a medical agent?

245 Mr. Nimmo: I don't believe he is qualified as a physician and surgeon.

Finlayson, P. J.: It seems they are trying to prove the contents of a book through this witness.

Mr. Nimmo: Objected to as not relevant to the inquiry.

Finlayson, P. J.: I think if you objected upon the ground that they are trying to prove the contents of some document by this witness

246 it will have to be sustained.

Mr. Friedlander: We have already laid the foundation in the examination of other witnesses. We have asked them whether it is listed as a medical agent.

Finlayson, P. J.: But we want the opinions of these experts based upon their years of experience.

Mr. Friedlander: And knowledge.

Finlayson, P. J.: But you can't prove one particular source of their knowledge in order to

247 get into the record the opinion of physicians who are not here to testify. Sustained.

Mr. Friedlander: Q. Have you ever analyzed alcoholic whiskey? A. Yes sir.

Q. Is there any test for the analysis of it? A. Yes sir.

Q. Where do you generally get the test for these different analysis? A. Either the U. S. Food Laws or the U. S. *phamacopoeia.*

Q. They prescribe given tests? Does this
248 U. S. *Phamarcopocia* prescribe a standard for all medical agents? A. Not for all, no.

Q. For most of them? A. Some.

Q. Did you find the standard or the test in the United States Pharmacopoeia as to whiskey? A. It isn't mentioned.

Q. It isn't mentioned? A. Not in the last edition.

Q. Been left out as a medical agent entirely?
249 A. Yes.

Mr. Friedlander: That's all.

Mr. Nimmo: No questions.

Dr. John L. Smith,

being first duly sworn as a witness in behalf of the respondent, testified as follows:

Direct Examination

By Mr. Odell: Q. What is your profession? A. Physician.

Q. Are you regularly admitted in California?

250 A. Been admitted in Southern California for seventeen years.

Q. Actively practicing in and around this county? A. Yes sir.

Q. With regard to the administration of alcoholic liquors for medicinal purposes, what is your opinion? A. My opinion is that they have their certain use which can be better performed by other substitutes.

251 Q. What is your opinion as to the effect of the limitation imposed upon the use of alcoholic liquors to eight ounces in a prescription. Has that the effect of destroying the value of such a prescription? A. My opinion is that it would not destroy the value of the prescription.

Finlayson, P. J.: Q. Is that based upon the further opinion that there are better substitutes -- A. Partly on that and partly on my past experience when I prescribed whiskey. For

252 the diseases these other physicians have named, my experience for those years has taught me that I could do just as well without it, and at the present time I hold no permit to prescribe it, although in fairly active practice.

Q. But you said, in effect, that eight ounces would be sufficient? A. I think it would.

Q. And that opinion is based upon your further opinion that whiskey isn't necessary at all? A. Yes.

253 Q. Because substitutes of whiskey are better? A. Yes sir.

Q. Now supposing you were of the same opinion that you were years ago, that whiskey had a medicinal value - - not only that, but that it was advisable to use it, and that you continued to use it now as then; would eight ounces in ten days be sufficient? A. I am quite sure it would. I have in mind one case of pneumonia in which we prescribed sixteen ounces,
254 and the man was sick - - I remember the case clearly as it was a case in which the crisis was the longest delayed of any that I have known - - the crisis didn't arrive until the eleventh day - - and we had more than a half pint of whiskey left after the crisis had passed, and we treated him twelve or thirteen days, using it constantly.

Q. Did you use any of these other substitutes in connection with whiskey in that case?
255 A. Yes, we used strychnia and digitalis.

Q. All doctors use either some whiskey or other stimulant? A. I have never known of a case treated alone with whiskey. I can't imagine such a case.

Q. You live in Los Angeles? A. Yes.

Q. Knowing the situation here with regard to the opportunity you have to obtain drugs which may be used in the same cases that whiskey was or has been or is now used, state whether in your opinion the prescription of

256 eight ounces of intoxicating liquor in ten days, aided by those drugs, would be sufficient or not? A. Taking what I know of the facilities for getting other medicines - -

Q. I mean using whiskey in connection therewith. A. I think that any case would not be harmed by being limited to eight ounces of whiskey in ten days.

Works, J.: Q. Do you know of any case, or have you known of any, in which more than
257 eight ounces would be required under the conditions just mentioned? A. Not required, but in many cases much more has been used.

Q. In your judgment would it be required in the sense that it would be beneficial? A. I think a smaller quantity, really, than that would be better.

Q. In the extremist case you can imagine? A. Yes sir. In the very extreme case there
258 would be a greater quantity of other positive stimulants.

Mr. Odell: Q. There has been considerable change during the last twenty years in the opinion of doctors as to the use of alcoholic liquors in diseases? A. There has been a great change in my opinion.

Q. What about the opinion of the profession in general? A. I can tell from the literature that there has been a great change in opinion,

259 and if I may state statistics, the journals of the American Medical Association, which speaks for a large body of physicians, states that only about forty per cent of the physicians of the United States have permits to prescribe whiskey.

Q. And the other sixty per cent have not taken them out? A. My figures may not be exact, but the majority is on the side of those not having permits.

260 Q. All physicians are entitled to permits if they desire to take them? A. Yes sir.

Q. Now considering a special case of old age - - a woman eighty-two years old and suffering with enlargement of the heart. State whether in your opinion there is any substitute available in the city of Los Angeles that it would be just as well to give her as whiskey? A. I would consider whiskey, taking the everage case of that sort, a rather risky thing

261 to give and use continually.

Q. Is there anything else you could use with better results? A. I think there are things much better to use.

Mr. Friedlander: That's all.

Cross-Examination

By Mr. Nimmo: Q. You say according to your information approximately forty per cent of the physicians and surgeons of the United States do have permits to prescribe alcohol?

262 A. That's my recollection — that the majority do not have.

Q. And also, based upon your contact with other physicians, you are aware of the fact that a great many of reputable physicians do prescribe whiskey? A. Yes sir, a great many.

Q. In your judgment has whiskey any medical value at all? A. I have used it.

Q. In your early practice you used it considerably more than at present? A. Yes.

263 Q. But on the other hand, you have used it in recent years? A. I can't remember the time when I have prescribed it since prohibition.

Q. You have no permit to use it now? A. No.

Q. When you prescribed whiskey at any time in your professional career you did so with the idea that it had some medicinal value? A. Yes sir.

264 Q. And has your opinion changed entirely, or is it merely now that there are substitutes for it? A. My opinion is this: That I think my idea of its medicinal value then was excessive; that it has its medicinal value now, but it also has deleterious effects which are not perhaps caused by the substitutes.

Q. All stimulative drugs have a deleterious effect if excessively used? A. Yes sir.

Q. And that is the fact about anything used in the nature of medicine? A. Yes.

265 Q. Now having in mind the statement you make that it has some medicinal value, and assuming in the judgment of the physician that he should prescribe whiskey for certain kinds of diseases - - for instance, take myocarditis - - that in such an instance as that if limited to eight ounces in ten days it would not be valueless as a prescription, in your judgment? A. Not in some cases; not useless, no.

266 Q. Would it be sufficient? A. It would be sufficient for any case I would find myself treating. Dr. Moore said he gave half-ounce doses very frequently in twenty-four hours. Eight ounces would not be enough to do that. But in my opinion it would amply suffice to carry any patient I have had experience with through ten days, because he very likely would not require it during the whole of the ten days.

267 Q. Assuming he did require it for the whole ten days in the doses which Dr. Moore said it would be necessary to prescribe, it would not be sufficient, would it? A. No. Half an ounce four times a day would be two ounces a day, which would only last five days.

Mr. Nimmo: That's all.

Re-Direct Examination

By Mr. Odell: Q. You say that is rather an excessive amount? A. I would so consider it.

268 Q. What is the customary dose of whiskey in such cases? A. As I considered it, the customary dose is from one to two teaspoonsfull every three hours.

Q. How many teaspoonsfull in a tablespoonfull? A. A teaspoonfull is practically one-eighth of an ounce - - one dram.

Q. And taking the legitimate amount - - two teaspoonsfull in three hours - - A. That's as-
269 suming it wouldn't be given regularly, but five or six doses in the twenty-four hours.

Q. What kind of a case is that you have just mentioned? A. That probably would be a pneumonia case.

Q. There are other cases where it is needed in larger quantities than in pneumonia, aren't there? A. Well, I don't think of a case now.

Q. Any of those prescribed by Dr. Moore? A. Well, I wouldn't think of giving it in a
270 myocarditis case. My impression would be that it was given more because the patient liked it that because they actually needed it. They call it a "kick."

Mr. Nimmo: Q. They like the stimulating effect and it has some value medicinally upon them? A. As a sedative, yes.

Mr. Nimmo: That's all.

Finlayson, P. J.: How long do you want to brief this case. * * *

30-30-10.

271 **Opinion of the District Court of Appeal.**

Crim. No. 905. Second Appellate District, Division Two. February 28, 1923.

In the Matter of the Application of M. W. Hixson for a Writ of Habeas Corpus.

Application for writ of habeas corpus prayed to be directed to the chief of police of the city of Los Angeles to secure the release of petitioner from custody after conviction of filling
272 a prescription for alcoholic liquor in violation of the Gandier ordinance Writ denied.

For Petitioner—Ray E. Nimmo, Lloyd W. Moultrie.

For Respondent—W. D. McConnell, city prosecutor for the city of Los Angeles; J. Friedlander, assistant city prosecutor; J. D. Taggart, deputy city prosecutor, and S. W. Odell.

Petitioner, a licensed pharmacist doing business in the city of Los Angeles, asks a dis-
273 charge on habeas corpus from imprisonment under a sentence convicting him of filling a prescription for alcoholic liquor in violation of an initiative measure adopted by the electors of the city and commonly known as the Gandier ordinance. The ordinance was adopted prior to the ratification of the eighteenth amendment and the passage of the National Prohibition Law. A complaint was filed in the police court charging petitioner with filling a physician's prescription calling for more than eight ounces of

91

274 alcoholic liquor, in violation of the city ordinance. He was convicted in that court, and on his appeal to the Superior Court the judgment of conviction was affirmed on June 5, 1922—all of which antedated the state law commonly known as the Wright Act. The single question presented for decision is whether the ordinance, insofar as it relates to the filing of prescriptions by licensed pharmacists, is valid and enforceable since the adoption of the eighteenth
275 amendment and the enactment of the National Prohibition Law, commonly known as the Volstead Act.

The Gandier ordinance, so far as its provisions are germane to the question, provides: "Sec. 2. It shall be unlawful to sell, serve or give away any alcoholic liquor within the city of Los Angeles, except as hereinafter provided. * * * Sec. 5. Nothing in the preceding sec-
276 tions of this ordinance shall be construed as rendering unlawful * * * (c) the filling only, at pharmacies, on the date of issuance, but not the refilling of prescriptions calling for not to exceed eight ounces of alcoholic liquor each. Every such prescription shall be * * * signed * * * by a duly licensed physician, and shall have endorsed upon it by such physician * * * the statement that in his opinion the liquor prescribed is required by such person as a medicine."

277 The Volstead Act, in section 7, contains this provision : "No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. * * * Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days, and no prescription shall be filled more than once."

It will be noticed that while the city ordinance limits to eight ounces (half a pint) the
278 amount which may be prescribed and sold at any one time for medicinal use, it places no limitation upon the number of prescriptions which may be made and filled for the same person within any fixed period of time. So that, at the time of the adoption of the ordinance, a physician, if in good faith he deemed it necessary, could every day, and perhaps more than once on every day, issue for any patient a pre-
279 scription for alcoholic liquor, provided each prescription called for not more than eight ounces. This he could continue to do until such time as his patient no longer needed the stimulant. And it was not unlawful for a licensed pharmacist to fill such daily prescriptions, provided no one of them called for more than eight ounces. It further will be noticed that though the Volstead Act permits a pint (sixteen ounces) of spirituous liquor to be prescribed by a physician for the use of a patient, not more than

280 that amount may be prescribed for the same person within any period of ten days, and no prescription shall be filled more than once.

We have not deemed it necessary to set forth all of the provisions of the Volstead Act which relate, directly or indirectly, to liquor prescriptions. When all of its provisions are considered there may be some question as to whether the act permits a physician to issue any number of prescriptions to the same person in any
281 period of ten days if the aggregate of the amounts so prescribed does not exceed one pint. Petitioner claims that when all the provisions of the National Prohibition Act are read together that law must be construed as meaning that but one prescription may be issued to the same person within the ten-day period, regardless of whether such prescription calls for a pint or for less than a pint. For the purpose of this decision, but for the purpose of this de-
282 cision only, we shall assume that in this respect petitioner's construction of the Volstead Act is correct.

At a hearing had before this court on the return made to our writ of habeas corpus, six physicians were examined as expert witnesses for the purpose of aiding us in determining the medicinal value of alcoholic liquors. All of them agreed that such liquors do possess some medicinal value. Some of the physicians testi-

283 fied that there are certain substitutes for alcoholic liquors which make the use of such liquors unnecessary and even undesirable. Others testified that in their opinion there is no substitute which can effectually take the place of alcoholic stimulants in certain cases, as in pneumonia, for example. Of these latter witnesses two or three testified that not even a pint of whiskey in ten days (the maximum amount permitted by the Volstead Act) would be sufficient in some cases.

284 Petitioner's principal contention is that while a state or a political subdivision thereof, in the exercise of its police power, may *regulate* the sale of alcoholic liquors for medicinal uses, it cannot *prohibit* their sale for such uses. This proposition constitutes the major premise of petitioner's argument on his first point. He argues that the restrictions in the Gandier ordinance, when taken in conjunction with those

285 in the Volstead Act, so limit the amount of alcoholic liquor which pharmacists in the city of Los Angeles may now sell in filling prescriptions that the combined effect of the operation of the ordinance and the national act has been to prohibit the sale in Los Angeles of an amount of alcoholic liquor sufficient to serve the purposes of a medicine. That is to say, though the Gandier ordinance does not forbid the issuance of more than one prescription to the same person in any period of ten days, it does make

286 it an offense for a pharmacist to fill any single prescription calling for more than eight ounces; and under petitioner's construction of the Volstead Act, no physician is allowed to issue more than one prescription for the same person in any ten-day period. Therefore, it is claimed that the practical effect of the combined operation of the national act and the city ordinance is to make it unlawful for a licensed pharmacist in the city of Los Angeles to sell to any one per-
287 son, on a physician's prescription, more than eight ounces of alcoholic liquor in any period of ten days, which amount, it is claimed, is so small as to be valueless for medicinal purposes. Assuming, without conceding, that such is the result of the operation of the city ordinance and the national law, we still do not think that the ordinance has been rendered unreasonable. For reasons presently to be stated, we think
288 that the ordinance would not have been unreasonable and void if it had entirely prohibited the sale of alcoholic liquor as a medicine. And if the city possessed the power entirely to prohibit its sale as a medicine, then, a *fortiori*, the limitation to eight ounces in ten days would not have been an unreasonable restriction.

It may be said *in limine* that if the argument whereby petitioner would strike down the city ordinance be tenable, then his argument would seem to be equally fatal to the national enact-

289 ment, insofar as the prescription of alcoholic liquor for medicinal use is concerned. For, according to the testimony of petitioner's medical experts, the maximum amount which it is assumed the Volstead Act permits to be prescribed —one pint, or sixteen ounces, in ten days—has but little, if any, more medicinal value than would be possessed by eight ounces administered in the same period of time; and neither amount, according to those witnesses, is sufficient to
290 meet the exigencies of certain cases, as, for example, where the patient has been stricken with pneumonia. But waiving this consideration, and assuming that the restriction which the Volstead Act imposes on the prescription and sale of spirituous liquors for medicinal use is within the authorized powers of Congress under the eighteenth amendment—and we are fully convinced that it is—and assuming also that petitioner's construction of the National
291 Prohibition Law is correct, still we do not agree with his premise that a municipal corporation, in the exercise of its police power, may not absolutely prohibit the sale of alcoholic liquor as a medicine.

That the state, or any political subdivision thereof vested with local police power, may prohibit all traffic in intoxicating liquors for *beverage* purposes is no longer a debatable proposition. It is possible that such drastic prohib-

292 itory legislation, however well-intentioned, may prove to be a Pandora's box from which may escape new and unforeseen social ills to afflict humanity. But that is a consideration to be addressed solely to the lawmaking branch of the government. With it the courts have no concern.

Not only may the sale of intoxicants as beverages be prohibited, but it also is well established that a state, or any of its political sub-
293 divisions invested with local police power, may adopt such measures having a real or substantial relation to the suppression of traffic in intoxicating beverages as it may deem necessary for that purpose in order to make its action effective. And though alcoholic liquor when used for certain purposes may be beneficial and useful, still its sale even for such beneficial and useful purposes may be prohibited if it can be
294 seen that prohibitory measures of that nature have a real and substantial relation to the suppression of all traffic in intoxicants for beverage purposes. In *Purity Extract Co. v. Lynch*, 226 U. S. 192, the United States Supreme Court stated the principle as follows: "That the state in the exercise of its police power may prohibit the selling of intoxicating liquors is undoubted. (Citing authorities.) It is also well established that when a state, exerting its recognized authority, undertakes to suppress what it is free

295 to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. (Citing authorities.) With the wisdom of the
296 exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended." (See, also, *People v. Velarde*, 45 Cal. App. 520.)

If wine, whiskey, brandy and the like are useful for medicinal and other nonbeverage purposes, still the evils which flow from their use
297 as a beverage so greatly menace the health, peace, morals and safety of society that the lawmaking branch of the government may with reason regard those evils as overwhelmingly outweighing the good services which such liquors may perform as medicines. If experience shows that the sale of intoxicating liquors for medicinal purposes opens the door to that train of evils which admittedly follows upon their general use as beverages, then why may not their use as medicines be absolutely prohibited? That

298 the sale of such liquors for medicinal purposes does greatly facilitate the evasion of the whole scheme of prohibitory legislation is a matter of common notoriety. A city's entire scheme of prohibition might fail if pharmacists were to be permitted to sell alcoholic liquors for medicinal use. And because this is so, the city of Los Angeles, had it deemed it wise and expedient, could have forbidden the sale of such liquors as medicines even though such sales,
299 regarded as separate transactions, might be entirely innocuous.

The fallacy of petitioner's position lies in the assumption that if an article is useful for any purpose its sale cannot be wholly forbidden. But notwithstanding an article may be useful for some purposes, its harmfulness to the public from its general use may be so great and widespread and its secret disposition may be
300 so difficult to prevent that the legislature, to protect the public, may absolutely forbid its manufacture or sale, or both, so as effectually to root out its evil effects altogether.

Though no case directly in point has been called to our attention, the principles announced in the following decisions of the United States Supreme Court are determinative: *Burtemeyer v. Iowa,* 18 Wall. 129; *Boston Beer Co. v. Massachusetts,* 97 U. S. 25; *Foster v. Kansas,* 112 U. S. 205; *Mugler v. Kansas,* 123 U. S. 623;

301 *Kidd v. Pearson*, 128 U. S. 1; *Powell v. Pennsylvania*, 127 U. S. 678; *Booth v. Illinois*, 184 U. S. 425; *Otis v. Parker*, 187 U. S. 606, and *Ah Sin v. Wittman*, 198 U. S. 500.

In *Mugler v. Kansas* the court went so far as to say that a state might prohibit the manufacture of intoxicating liquors by a person for his own use, if in the judgment of the legislature such a measure is necessary. In *Kidd v. Pearson* the doctrines laid down in *Mugler v.*
302 *Kansas* were approved and reaffirmed. *Powell v. Pennsylvania* directly presented the question of absolute prohibition, and the decision was in favor of the measure. That the substance in question is that case was oleomargarine cannot alter the principle, because it is conceded that the article was in itself useful and not at all harmful. The reason of the prohibition was the great danger of fraud in its being mistaken
303 for real butter. But there is nothing which is the subject of so much fraud as the sale of intoxicating liquors. Even physicians have been prosecuted for giving fraudulent prescriptions in order to assist their "patients" in obtaining intoxicating liquors unlawfully; and as to the frauds of druggists in handling liquors, it is said in the *Druggist Cases*, 85 Tenn. 458, that the evasions of the law are frequent and notorious.

In *Booth v. Illinois* the court, having under examination the Illinois statute prohibiting op-

304 tions to buy or sell grain or other commodities at a future time, said: "The argument then is that the statute directly forbids the citizen from pursuing a calling which in itself involves no element of immorality, and therefore by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business,
305 where such business properly conducted may not in itself be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks
306 that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

As having further bearing upon the right which the city would have had to prohibit ab-

307 solutely the sale of intoxicating liquors for medicinal purposes, reference may be made to the following cases: *State v. Fabbri*, 98 Wash. 207, L. R. A. 1918A 416; *Re Crane*, 27 Idaho 671, L. R. A. 1918A, 942 (affirmed in 245 U. S. 304); *Schmitt v. Cook Brewing Co.*, 187 Ind. 623, 3 A. L. R. 270; *Cureton v. State*, 135 Ga. 660, 49 L. R. A. (N. S.) 182; *Delaney v. Plunkett*, 146 Ga. 547, L. R. A. 1917D 926; *Woods v. City of Seattle*, 270 Fed. 315; *Page v. United*
308 *States*, 278 Fed. 41; *Piel Bros. v. Day*, 278 Fed. 223; *Falstaff Corp. v. Allen*, 278 Fed. 642, and *Massey v. United States*, 281 Fed. 293. Though none of these decisions is directly in point, their reasoning is persuasive and tends to uphold our conclusion.

Of all the cases to which our attention has been called, none is so nearly in point as *State v. Durein*, 70 Kan. 1, 15 L. R. A. (N. S.) 908
309 (affirmed in 208 U. S. 613), and *Motlow v. State*, 125 Tenn. 547, L. R. A. 1916F 177. True, much that is said in these cases respecting the right to prohibit the sale of alcoholic liquors as medicines is dictum. But the reasoning of the Kansas and Tennessee courts in these cases, even though much of it be dictum, is so cogent and logical as to form a solid foundation for the proposition that a city, possessing local police power, may entirely prohibit the sale of alcoholic liquor for a medicinal use.

310 In *State v. Durein* the Kansas court, from whose opinion we shall quote *in extenso,* states in the following forceful language the law which is determinative here: "The commodity in controversy is intoxicating liquor. It is not corn or rye or hops or grapes, or any other product whose cultivation and use ministers to the normal and necessary wants of mankind * * * But the article is one whose use, even moderately, is taken into account by actuaries
311 of insurance companies, and which bars employment in classes of service involving prudent and careful conduct—an article conceded to be fraught with such contagious peril to society that it occupies a different status before the courts and the legislatures from other kinds of property, and places traffic in it upon a different plane from other kinds of business. There is, therefore, no question in this case
312 of the power of the legislature to say generally what beverages men shall drink, or what they shall eat or wear, or when they shall rise or retire. The discussion must deal solely with a distinct article of trade, which already has earned a certain measure of reproach among civilized peoples. * * * It is true that intoxicating liquors may be devoted to sacramental, medical, scientific and mechanical uses, all conducive to the welfare of society. But this fact does not remove the stigma which has been

313 fixed upon them. Intoxicating liquor is intoxicating liquor still, whether it be employed before the altar, at the bedside, in the laboratory, in the manufactory or in the saloon. It is still the prolific source of disease, misery, pauperism, vice and crime. Its power to weaken, corrupt, debauch and slay human character and human life is not destroyed or impaired because it may be susceptible of some innocent uses, or may be used with propriety on some occasions. The
314 health, morals, peace and safety of the community at large are still threatened, and, under the form of government established for this state, and for the union of states of which it is a member, those are special subjects of local legislative cognizance. * * * The manufacture and sale of property in itself wholesome and harmless may be entirely prohibited merely to prevent deception and fraud. * * * In
315 *Mugler v. Kansas,* 123 U. S. 623, * * * the private right to manufacture liquor for the producer's own individual use was contended for—a right of equal rank with that of manufacturing or selling for medical, scientific or mechanical purposes. But the court said: 'It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or af-

316 fect the rights of others. If such manufacture
does prejudicially affect the rights and interests
of the community, it follows, from the very
premises stated, that society has the power to
protect itself by legislation against the injurious
consequences of that business.' * * * It is
said, however that in no case has it been de-
cided that the sale of intoxicating liquors for
medical, scientific and mechanical purposes may
be entirely prohibited, when that was the ques-
317 tion under discussion. But the principles an-
nounced are determinative of that question.
Power to legislate for the health, morals, peace
and good order of society being conceded to
the legislature, that body must determine the
limits of its exercise, subject only to the condi-
tion that the measures adoped are reasonably
appropriate to effect its purposes; and upon this
question the court will rarely substitute its judg-
318 ment for that of the legislature. * * * No
body of men can be so well informed regarding
the composition, character and distribution of
the state's citizenship, the origin, habits, cus-
toms, culture and ideals of the people, the mod-
ifying influences of their environment, the scope
and possibilities of their industries, and all other
facts relating to their welfare as a distinct polit-
ical entity, as representatives of those people
chosen from the various localities of the terri-
tory concerned. They understand better than

any court possibly can the evils chargeable to the presence of intoxicating liquors among their own constituents; they know the extent to which intoxicating liquors are used and may be used by their own people as medicine and in lawful business pursuits; they are able to judge what are and what are not desirable means to desirable ends; and if, in their judgment, high license, low license, local option, state monopoly and all other methods of regulation and restraint are fruitless measures for the protection of the health, morals, peace and safety of the state against the use of intoxicating liquors; if, under the best possible regulations, drug stores or other dispensaries become in fact saloons; if such records of sales as are made at those places reek with rottenness; if by such expedients the door is merely opened to deception and fraud and perjury; if unpreventable infractions of the best liquor law devisable lead to a general disregard of law and contempt for its enforcement and administration; and if drunkenness still remains common—the legislature may banish the traffic altogether. Whether, as a matter of policy, the legislature ought to go to any such length, the courts have no right to say. That it has the power, under the law, to do so, the courts cannot under the law do otherwise than declare."

In *Motlow v. State, supra,* the Tennessee court, after an exhaustive review of the author-

322 ities, state and federal, said that the weight of authorities is in favor of total prohibition—a "bone dry" law—and against the proposition advanced by Freund and some other text writers to the effect that the legislature does not possess the power to prohibit the prescription and sale of alcoholic liquors for medical use. There the court said: "The fallacy of the whole argument [the argument that the thing prohibited must be in itself harmful and incapable of a
323 harmless use] is in the assumption that, if an article is useful for any purpose, it cannot be wholly forbidden, no matter how greatly its evil capabilities and actual uses overbalance the good purposes it serves. The legislature is the judge of the times and occasions when public danger threatens, and it is for the courts to apply the test of the constitutional limitations and restrictions, and these must be applied with a careful
324 and discriminating judgment. * * * We are referred to section 223 of Freund's Police Power for the statement that the power of the legislature to prohibit the prescription and sale of liquor to be used as a medicine does not exist, and that the exercise of this power would be purely arbitrary, based upon *Sarris v. Com.*, 83 Ky. 327. The legislation in question does not contain that prohibition, because the proviso permits the sale of alcohol which may be used for medicinal purposes. However, the weight

325 of authority is against even this proposition, and in favor of total prohibition, as we shall presently show. Other text writers declare the right of absolute prohibition."

From the principles underlying the foregoing cases it is apparent that though the sale of alcoholic liquors for medicinal purposes may not be in itself noxious, nevertheless the city of Los Angeles could have prohibited such sales because of the great opportunity afforded thereby
326 for aiding those whose purpose and desire is to violate those provisions of the ordinance which prohibit the sale of intoxicants as beverages. Legislation prohibiting the sale of alcoholic liquor for medicinal use might be repugnant to our sense of justice, or it might even be regarded as unnecessarily oppressive to those desiring to use alcoholic liquor for that purpose; but if that is all which may be said against it, the
327 appeal must be to the legislature or to the ballot box, not to the judiciary. "This court," says the Supreme Court of Indiana in *Schmidt v. Cook Brewing Co., supra,* "has nothing to do with the wisdom or unwisdom of the legislative act. A law may be repugnant to general principles of justice, liberty and rights not expressed in the Constitution, and yet the courts have no power to strike it down."

In support of his contention that the city does not possess the power to prohibit the prescrip-

328 tion and sale of intoxicating liquor to be used as a medicine, petitioner cites us to Freund on Police Power (Secs. 222 and 223); Tiedeman on State and Federal Control of Persons and Property (p. 512 of 1900 Ed.); *Town of Selma v. Brewer*, 9 Cal. App. 70; *Commonwealth v. Fowler*, 96 Ky. 166; *McNulty v. Toof*, 116 Ky. 202; *Sarris v. Commonwealth*, 83 Ky. 327, and *Ex parte Cowert*, 92 Ala. 94.

329 That the opinions of Freund and Tiedeman respecting the power to prohibit the prescription and sale of alcoholic liquor for medicinal purposes are unsound and fallacious is so clearly shown by the Tennessee supreme court in its able and exhaustive treatment of the subject in *Motlow v. State, supra*, that it would be supererogatory for us to attempt to add to that court's pregnant criticisms.

330 *Town of Selma v. Brewer, supra*, presented a question as to the true interpretation of a municipal ordinance. According to the sweeping terms of one of its sections, the ordinance under consideration in that case purported to make the keeping, possessing or storing of intoxicating liquors unlawful, without any express reference to the disposition to be made of them by the keeper or possessor. In view of the other provisions in the ordinance, this sweeping inhibition against keeping, possessing and storing was construed as intended to prohibit the

storing or possessing of such liquor with a view to engaging in its unlawful sale. What was said in that case about the lack of power to prohibit the sale of intoxicating liquors for medicinal use was not necessary to the decision and was pure dictum. Nor was any attempt made to buttress the dictum by the citation of those authorities wherein the courts have discussed the principles of constitutional law which underlie the question. For these reasons we do not accept that decision as authority here. In each of the Kentucky cases cited by petitioner the court upheld the particular statutory provision under which the accused was charged. What was said in those cases respecting the unconstitutionality of an inhibition against the sale of intoxicating liquors for medicinal purposes was, therefore, dictum pure and simple, and is not to be taken as authority upon the question before us. The same may be said of the Alabama case cited by petitioner—*Ex parte Cowert*. Like the Kentucky cases, it makes no attempt to sustain its dictum by reasoning based on any generally recognized principles of constitutional law applicable to the enactment of prohibitory legislation.

Concluding, as we do, that the city of Los Angeles, had it chosen to exercise the power, might have prohibited in the first instance all sales of alcoholic liquor as a medicine, it can-

334 not be held that the city's restriction upon the filling of prescriptions by pharmacists has been so far augmented by the National Prohibition Law that it has now become unreasonable and void.

Petitioner's second point is that subdivision c of section 5 of the Gandier ordinance—the subdivision relating to the filling of prescriptions by pharmacists—discriminates unlawfully between the filling of prescriptions for alcoholic
335 liquors and the filling of prescriptions for drugs or other curative agencies. There is no merit in the contention. The ordinance deals only with alcoholic liquors. It is possible that there are ordinances of the city, not placed before us, which regulate in a similar manner the sale of drugs and narcotics. But even if the sale of drugs, poisons and narcotics has not been similarly regulated, the ordinance in question
336 does not arbitrarily discriminate between the sales of such articles and the sale of alcoholic liquors as medicines. No reasonable person will dispute the proposition that in view of the many evils which are peculiar to the consumption of intoxicating liquors regulations may be made which are specially applicable to the sale thereof. Police laws need not necessarily be omnibus in their character; and it is permissible to legislate against one form of evil even though other and similar evils have not been con-

337 demned. A person guilty of violating an ordinance regulating or prohibiting an evil of one character cannot complaint that evils of a different character but equally pernicious have not been similarly regulated or prohibited. "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the
338 discrimination can be said to impair that equal right which all can claim in the enforcement of the law." (*Soon Hing v. Crowley*, 113 U. S. 703.) Thus, in *Maguire v. Reardon*, 41 Cal. App. 596, it was held that an ordinance which provides for the general demolition and removal of wooden buildings within the city's fire limits is not open to the objection that it is discriminatory because it does not refer to buildings made of other inflammable material. And in
339 *Philadelphia v. Brabender*, 201 Pa. St. 574, 58 L. R. A. 220, it was held that an ordinance which prohibits the casting of handbills and advertisements into the vestibules of dwellings, although excepting newspapers and addressed envelopes, does not impair equal rights or make an unlawful discrimination. (See, also, *Butte v. Paltrovich*, 30 Mont. 18, 104 Am. St. Rep. 698, and *Ex parte Hadacheck*, 165 Cal. 416, 422, affirmed in 239 U. S. 394.)

340 It next is urged that the main purpose of the Gandier ordinance was to permit or legalize the sale of certain kinds of intoxicating liquors for beverage purposes, such as light wines and beers; that the legalization of the sale of these alcoholic liquors for beverage purposes has been rendered invalid by the eighteenth amendment and the Volstead Act; that subdivision c of section 5 of the ordinance was intended to be but an auxiliary provision—a mere incident to the
341 authorization of the sale of beers and wines; and that this auxiliary provision would not have been enacted as a separate and independent regulatory measure, but only as an incident to what counsel are pleased to declare is the main purpose of the ordinance. From these premises it is argued that because what counsel claim was the main purpose of the ordinance—the legalization of the sale of light wines and beers
342 —has been made illegal by the eighteenth amendment and the Volstead Act, the whole ordinance has become a nullity, and the auxiliary provision contained in subdivision c of section 5 falls with the rest. There is no merit in the contention.

One vice of petitioner's argument lies in the assumption that the main purpose of the ordinance was to *legalize* the sale of certain kinds of liquors—light wines and beers. On the contrary, its main purpose seems to have been pro-

343 hibitory. In section 1 of the ordinance it is expressly declared that "it shall be unlawful to establish, maintain or conduct within the city of Los Angeles any * * * place in which, or in connection with which, alcoholic liquor is sold, served or given away, except as hereinafter provided." Section 2 provides that it "shall be unlawful to sell, serve or give away any alcoholic liquor within the city of Los Angeles, except as hereinafter provided." Sec-
344 tion 5 provides that nothing in the preceding sections "shall be construed as rendering unlawful" any of the following acts: The service of alcoholic liquors in private homes; the use of wine for sacramental purposes; the filling of prescriptions at pharmacies; the sale of pure alcohol by registered pharmacists for scientific or medicinal purposes the sale between specified hours "of not less than one-fifth of a gallon
345 of vinous and malt alcoholic liquors in sealed or corked containers or closed packages" at any place within a certain designated zone, provided the same shall not be consumed on the premises where sold; and the servce of vinous and malt alcoholic liquors with *bona fide* meals at a club, restaurant or hotel, the proprietor whereof holds a valid license. In section 9 it is provided that the term "vinous and malt alcoholic liquors" shall include all malted and fermented liquors which do not contain more than

346 14 per cent by volume of alcohol, and which do not contain any distilled spirits.

It will be noticed that the ordinance nowhere says that it shall be "lawful" to sell vinous or malt alcoholic liquors, or any kind of intoxicating liquor. What the ordinance does say is that the general and sweeping prohibitory provisions in sections 1 and 2, banning traffic in all alcoholic liquor, shall not be construed as rendering "unlawful" the specifically designated
347 exceptions to those comprehensive prohibitory provisions. In other words, without intending affirmatively to *legalize* the sale of any intoxicating liquor, the ordinance, read as a whole, makes it unlawful to sell any but certain specified kinds of liquors or liquors used for certain defined purposes. Prohibition of traffic in certain kinds of strong drink is the principal object sought by the ordinance. The only criticism
348 which might be made is that while prohibition is the ordinance's main purpose, its inhibitions do not cover all of the zone now occupied by the eighteenth amendment and the Volstead Act. That, however, does not affect the validity of the ordinance's prohibitory features, nor does it affect such of its regulatory provisions as are not in conflict with the eighteenth amendment or the Volstead Act. Every inhibitory provision of the ordinance, including that which forbids the filling of a medical prescription call-

349 ing for more than eight ounces of alcoholic liquor, may stand without obstructng or embarrassing the execution of the act of Congress. Thus, for example, the city could inflict the penal sanctions of the ordinance upon pharmacists who fill prescriptions calling for more than eight ounces of liquor without in anywise interfering with the authority of the federal officials to invoke the penalties prescribed by Congress if these same pharmacists should aid
350 and abet a physician in violating that provision of the national law which makes it unlawful to prescribe for the same person more than one pint of intoxicating liquor in any period of ten days. The state, or a political subdivision thereof, in the exercise of the police power which is inherent in the state and preserved to it by the tenth amendment to the Federal Constitution, and the Federal Government, in the exercise of the delegated power which it derives
351 from the eighteenth amendment, may each enact laws to secure prohibition, with the one limitation that no legislation can give validity to acts prohibited by the eighteenth amendment. Each may exercise an independent judgment in selecting and shaping measures to enforce prohibition. These measures may vary in many particulars, but this is an inseparable incident of independent legislative action in distinct jurisdictions. (*United States v. Lanze*, U. S. adv. ops. 1922-23, p. 169.)

352 It also is urged that those provisions of the ordinance which declare that the sale of wines and beers shall not be unlawful—permissive provisions which were nullified by the eighteenth amendment and the Volstead Act—are so intimately interwoven with the other provisions of the ordinance that it must be assumed that the electors who voted for this initiative measure intended that the whole ordinance should fall if its provisions permitting the sale of wines
353 and beers should subsequently be nullified by the paramount power of the Federal Government. We can see no merit in the contention. This is not a case where some parts of a whole statute or of a whole ordinance were beyond the legislative power when originally enacted. Where some substantial part of a law is unconstitutional and void when the law is first enacted, the rule is that the whole statute or the
354 whole ordinance will fall if all of its parts are so mutually connected with and dependent on each other as to warrant the belief that the lawmakers intended them as a whole and that if all could not be carried into effect the residue would not have been passed independently. That rule is not applicable here. When this ordinance was adopted all of its provisions were valid and strictly within the constitutional power of the city and of the electors who voted upon it as an initiative measure. As was said

355 by the Massachusetts Supreme Judicial Court in *Commonwealth v. Nickerson,* 236 Mass. 281, 10 A. L. R. 1583, addressing itself to a similar proposition: "It [the state statute] was all operative and valid, and strictly within the constitutional power of the legislature when enacted. The point now is to ascertain whether the parts under which the present complaint is brought still remain valid and enforceable. This point is not the same which would arise where a
356 whole statute has been enacted, some parts of which are beyond legislative power under then-existing constitutional provisions."

The rule that the whole statute will fall if, when passed, some of its parts are unconstitutional and if all of its parts are so dependent upon each other as to warrant the belief that the legislature intended them as a whole, rests upon the presumed intent of the lawmakers.
357 But here the intent of those who made this ordinance a city by-law must be ascertained as of the time when they voted for its adoption. At that time this initiative measure, in all of its parts, was a valid expression of the electors' legislative will and intent. Then the ordinance was altogether impregnable in its constitutional aspects, and there was then a complete and valid expression of the intent of the lawmakers. The precise question, therefore, is: How much of a statute or of an ordinance, perfectly valid

throughout at the time of its adoption, remains enforceable when, since its adoption, a superior power has supervened with a fundamental governing law at variance with some of its terms? Such a situation is analogous to that where, after the passage of some perfectly valid and enforceable law, a change takes place in the conditions obtaining in the field of the law's activities, such, for example, as a change in certain physical facts, so that the practical enforcement of the law in all of its aspects is no longer a physical possibility. Such supervening alteration in the law's environment might afford a reason for its repeal by the lawmaking body or a reason for its amendment to conform to the altered conditions, but it can afford no ground for judicial repeal.

The principle declared in *In re Rahrer*, 140 U. S. 545, 564-5, is applicable here. There it was held that a state statute, invalid at the time of its enactment for the reason that it infringed upon the Federal power, was rendered valid and enforceable without re-enactment simply by the subsequent passage of an act of Congress removing an impediment to the enforcement of the state law and thus conferring jurisdiction in that particular upon the states. That decision upholds this ordinance to the extent to which we have decided it to be operative. In *Commonwealth v Nickerson, supra,*

361 will be found a logical and convincing discussion of this question. (See, also, *Ex parte Pappas*, 38 Cal. App. Dec. 15.)

Petitioner's final point is based upon a recent decision of the Florida Supreme Court—*Hall v. Moran*, 81 Fla. 706. Because the Volstead Act expressly permits physicians to prescribe for any one person one pint of spirituous liquor in any period of ten days, petitioner claims that there is thereby granted by Congress to
362 citizens of the United States a "right" or a "privilege" which is protected by the fourteenth amendment, and that no state or political subdivision thereof may abridge such right or privilege. The decision of the Florida Supreme Court in *Hall v. Moran, supra*, seems to lend support to this proposition. We are unable to agree with the reasoning of that case. Because the Volstead Act declares that "it shall not be
363 unlawful to possess liquors in one's dwelling" for personal consumption by the owner, his family and guests, the Florida court held that permission was given by Congress to possess liquors, and that such permission confers "a Federal *right* in the nature of a 'privilege' to lawfully possess, and an 'immunity' from punishment for such lawful possession"; and that a state statute making it unlawful for anyone to have in his possession more than a certain defined quantity of liquor is a denial or curtailment of

364 the "right" so conferred by Congress, and perhaps is also a violation of that provision of the fourteenth amendment which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The vice of this argument, as we view it, lies in its assumption that Congress may grant the "right" to possess intoxicating liquors. The eighteenth amendment—the sole source of the
365 power of Congress to deal directly with the liquor traffic—is a prohibitory, not a permissive, amendment. It declares that "the manufacture, sale or transportation of intoxicating liquors * * * for beverage purposes is * * * *prohibited*"; and by the second section of the amendment Congress is given power to enforce such national prohibition by appropriate legislation. There is here no grant to Congress of
366 the power to create or confer any "right" to possess intoxicating liquors. The sole power granted to Congress is the power to enforce the Federal *prohibition* contemplated by the amendment. In the exercise of its power to prohibit the manufacture, sale and transportation of intoxicating beverages, Congress unquestionably may regulate the possession of such liquors for private use, since the regulation of such possession has a substantial relation to the enforcement of the prohibition aimed at

367 by the amendment. (*Page v. United States, supra.*) But its power so to regulate the possession of liquors is but an incident to its power to prohibit. Its power to regulate possession for private use exists solely because such regulation of possession is an appropriate means whereby the expressly granted power to prohibit the manufacture, sale and transportation may be effectively carried into execution. So far from being the grant of a right, the con-
368 gressional regulation of possession is a limitation upon right or privilege. It is a limitation upon that privilege of possessing liquors which, but for the Federal regulation, would be unlimited, save insofar as it might be limited by state legislation. It is absurd to say that Congress, merely because it has the power to regulate the possession of intoxicating beverages as an incident to its expressly granted power
369 to prohibit their manufacture, sale and transportation, *confers* a "right" by appropriate regulatory provisions, it places limitations upon the privilege of possessing liquors.

We quite agree with the ruling of Judge Neterer in *Woods v. City of Seattle, supra* (270 Fed. 315), where it was held that the eighteenth amendment and the national prohibition act confer no right to sell Jamaica ginger in quantities not prohibited by the act, but were intended as limitations upon the privilege, and

370 that, therefore, a state, under its police power, can prohibit sales in such quantities as are permitted by the national prohibition act. That was a case brought by a duly registered druggist to enjoin the defendants from interfering with the sale of Jamaica ginger, the sale whereof was made unlawful by a city ordinance. Under a regulation of the commissioner, authorized by the National Prohibition Act, druggists are permitted to sell Jamaica ginger in quan-
371 tities exceeding one or two ounces at a time. In the course of his opinion Judge Neterer says: "The plaintiff asserts that article 18, *supra* [the eighteenth amendment], and the National Prohibition Act grant him a right to do except that which is prohibited, and that this right overrides all police power of the state with relation to intoxicants. In this plaintiff is in error. Instead of granting a right, the amend-
372 ment and the Volstead Act are limitations upon privilege."

The writ is discharged and the petitioner is remanded.

FINLAYSON, *P. J.*

I concur:
CRAIG, *J.*

CONCURRING OPINION.

I concur in the judgment, but I am not in accord with the views expressed by the majority opinion in making disposition of the first point

373 discussed therein. Considering the importance of the question mentioned, it is proper that I should state the grounds upon which I decline to concur in those views, presenting them in outline only and not with the assiduity which characterizes the treatment of the subject in the majority opinion. I shall then state with great brevity the reasons which impel me to concur in the judgment.

374 If any proposition of law is well settled, in most jurisdictions, at least, it is that every person has the constitutional right to resort to such established and legalized school or system of healing as he pleases for relief from his ailments. When men differ in opinion merely as to the efficiency of different schools or systems, it is not a proper subject of legislation to attempt to control or limit the right of any to act pursuant to his opinions or beliefs by

375 resorting to the school or system of his choice (*Eastman v. State,* 109 Ind. 278, 10 N. E. 97; *State v. Liffring,* 61 O. st. 39, 55 N. E. 168; *State v. Biggs,* 133 N. Car. 729, 46 S. C. 401; *State v. Smith,* 25 Ida. 541, 138 Pac. 1107; Bishop on Stat. Crimes, Sec. 998a; Freund, Police Power, Sec. 16. As having a general bearing upon the question, see, also, *State v. Gravelt,* 65 O. st. 289, 62 N. E. 325; *Louisiana State Board v. Carpentier,* 140 La. 405, 73 Sou. 248; *American School v. McAnnulty,* 187 U. S.

376 94). This principle has found frequent expression, not only in the cases cited, but in others, at the suit of the homeopath, the eclectic, the osteopath, the chiropractor and the Christian Scientist.

A necessary corollary to the proposition just stated, so it seems to me, is that one may not be deprived, constitutionally, of his right to have alcoholic beverages prescribed for him as a medicine. If one may resort, without fear of legis-
377 lative interference, to the duly qualified practitioners under the system in which that one believes, it must be true that he is also entitled, without fear of such interference, to use the medicines which his practitioner prescribes, as well as to submit himself to the rubbings or massage, or insist upon the benefit of the prayers, which are a part of the practitioner's system. Of what value is the patient's right to
378 resort to the practitioner if he may be denied the services of the latter after he is called? Of what value is that right if the patient may be denied the medicines which the practitioner prescribes for his relief, whether alcohol or hot water? It appears to me, at least so far as the expressions of the majority opinion to the contrary are concerned, that a patient must have the constitutional right to resort, without stint or limitation, except as imposed by the practitioner in his prescrptions, to the medicine in

379 which the school of the honest and qualified physician believes.

I am, therefore, impelled to the view that certain authorities which the majority opinion discredits are closer to the instant case than are those which it follows. The authorities which I have in mind are the ones to the effect that the legislative department may not prohibit the prescription and sale of intoxicating liquor as a medicine. (See *Sarris v. Commonwealth*,
380 83 Ky. 327; *Commonwealth v. Fowler*, 96 Ky. 166, 28 S. W. 786; *McNulty v. Toof*, 116 Ky. 202, 75 S. W. 258; *Ex parte Cowert*, 92 Ala. 94, 9 Sou. 225; *Town of Selma v. Brewer*, 9 Cal. App. 70; Freund, Police Power, Secs. 222, 223; Tiedeman, State and Federal Control of Persons and Property, Sec. 112.) It is clear to me that, if these authorities state the law, it logically follows that the amount to be sold
381 cannot be limited by legislation. If it be conceded that the physician may prescribe and the patient use a certain drug, it must be true that the physician must be allowed a free and untrammeled judgment to determine the quantity to be prescribed and used. If he may not exercise that judgment the patient is deprived of his services, for if, in the opinion of the physician, a given quantity of any drug is necessary to a healing, for him to be forced to prescribe less were as if he were forbidden to prescribe at all.

382 Notwithstanding all that I have said above, there are at least two decisions of the Supreme Court which appear to me to preclude the application of the principles to which I have referred. They are *Abeel v. Clark*, 84 Cal. 226, and *French v. Davidson*, 143 Cal. 658, and they establish the rule that compulsory vaccination laws are constitutional. There are certain differences between those cases and the one now before us, but it does not appear to me that the
383 differences are such as to render the cases inapplicable here. It is upon those two cases alone that I base my present concurrence.

WORKS, *J.*

[TITLE OF COURT AND CAUSE.]

Assignment of Errors.

Now comes the plaintiff in error and respectfully submits that in the record, proceedings,
384 decision and final judgment of the District Court of Appeal of the State of California, Second Appellate District, Division Two, in the above entitled matter, there is manifest error in this, to-wit:

1. The court erred in holding that ordinance Number 37,699 (New Series), of the City of Los Angeles, in the County of Los Angeles, State of California, and Subdivision (c) of Section 5 thereof, are not in conflict with the Four-

385 teenth and the Eighteenth Amendments to the Constitution of the United States and the National Prohibition Act of the United States, for the reason that the said City of Los Angeles assumes the right, and seeks, to deprive plaintiff in error and other citizens of the United States and of the State of California of rights, privileges and immunities secured to other citizens of the United States and said State, and
386 to deprive plaintiff in error and other citizens of liberty and property without due process of law and to deny plaintiff in error and other citizens within the jurisdiction of the State of California the equal protection of the law, and to modify and change the provisions of the National Prohibition Act, and to prohibit that which the National Prohibition Act expressly permits.

2. The court erred in holding that by the
387 provisions of said ordinance the plaintiff in error is not deprived of rights and privileges and immunities secured to other citizens of the United States and of the State of California by the Constitution of the United States and its laws.

3. That the court erred in holding that the sale of alcoholic liquor as a medicine could be entirely forbidden and prohibited.

4. That the court erred in holding that the State of California or the City of Los Angeles

388 could by reason of their police power prohibit all traffic in intoxicating liquor for any purpose.

5. That the court erred in holding that the said ordinance Number 37,699 (New Series) of the City of Los Angeles was valid in its restriction of the use of intoxicating liquor for medical purposes.

6. That the court erred in holding that the said ordinance Number 37,699 (New Series) did not contravene the provisions of the National
389 Prohibition Act of the United States of America (41 Statutes-at-large 305).

7. That the court erred in holding that the said ordinance and the authority exercised thereunder and thereby were within the police powers of the said City of Los Angeles.

8. That the court erred in holding that the prohibition of the sale of intoxicating liquor as medicine would not abridge an inalienable and
390 constitutional right of the plaintiff in error to pursue a lawful vocation in a lawful way without interference by the said City of Los Angeles and the State of California.

9. That the court erred in holding that said ordinance Number 37,699 (New Series) did not discriminate unlawfully between those filling prescriptions for alcoholic liquors and those filling prescriptions for drugs and other curative agencies.

391 10. That the court erred in holding that the provisions of said ordinance do not cast specific burdens upon those engaged in filling prescriptions of alcoholic liquors in that said prescriptions are rendered valueless and said business destroyed.

11. That the court erred in holding that restrictions upon the sale and dispensing of intoxicating liquors as medicine could be made to such an extent as to become prohibitive and
392 could thus confiscate and destroy the business of filling prescriptions as medicine.

12. That the court erred in holding that the provisions of said ordinance of the said City of Los Angeles are uniform in their operation and do not discriminate between classes of persons unjustly and unconstitutionally.

13. That the court erred in holding that prescriptions of alcoholic liquor for medical pur-
393 poses, issued by regularly licensed physicians, could be prohibited without reference to the good or bad faith of the physician issuing the same and that alcoholic liquor as a curative agency could be removed entirely and its use forbidden.

14. That the court erred in holding that the provisions of Subdivision (c) of Section 5 of said ordinance regulating the filling of prescriptions of intoxicating liquor had not been ren-

394 dered unconstitutional by virtue of the terms of the Eighteenth Amendment to the Constitution of the United States and the National Prohibition Act of the United States, by which the remaining portions of said ordinance of the City of Los Angeles were rendered unconstitutional and void.

15. That the court erred in holding that the City of Los Angeles could enforce an ordinance
395 modifying and limiting the provisions of the Volstead Act by which physicians are permitted to prescribe for patients certain forms of intoxicating liquor.

16. The court erred in ordering judgment to be entered denying plaintiff in error his discharge upon a writ of habeas corpus and remanding him to the custody of the defendant in error.

RAY E. NIMMO

396 Attorney for Plaintiff-in-error.

Endorsed: Filed May 18, 1923. W. D. Shearer, Clerk.

[Title of Court and Cause.]

Prayer for Reversal.

Now comes Merlin W. Hixson, the plaintiff in error, and prays for a reversal of the judgment of the District Court of Appeal of the State of California, Second Appellate District,

397 Division Two, in the suit brought by him as petitioner against the defendant in error, Louis D. Oakes, as respondent, asking that said court issue a writ of habeas corpus, and under the same to cause the said plaintiff in error to be discharged from the custody of the defendant in error, in which cause judgment was entered on the first day of March, 1923, denying the plea of the plaintiff in error and remanding him to the custody of the defendant in error.

398 Dated this 18th day of May, 1923.

Ray E. Nimmo
Attorney for Plaintiff in Error.

Endorsed: Filed May 18, 1923. W. D. Shearer, Clerk.

[TITLE OF COURT AND CAUSE.]

Petition.

399 TO THE HONORABLE FRANK J. FINLAYSON, PRESIDING JUSTICE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO:

Now comes Merlin W. Hixson, the above named petitioner and plaintiff in error, by his attorney, Ray E. Nimmo, and complains and alleges:

400 1. That he is a citizen of the United States of America.

2. That in the above entitled cause, being Crim. No. 905, an application and petition in behalf of the petitioner and plaintiff in error was filed in the office of the clerk of the District Court of Appeal of the State of California, in the Second Appellate District, on the 13th day of June, 1922. That said action was styled, "In the Matter of the Application of M. W.
401 Hixson, for a Writ of Habeas Corpus."

3. That said petitioner and plaintiff in error, Merlin W. Hixson, had theretofore been arrested by a police officer of the City of Los Angeles and was charged with a violation of the terms of Ordinance Number 37,699 (New Series) of the City of Los Angeles, being an ordinance designated and entitled, "An ordinance prohibiting saloons; and prohibiting the sale of
402 distilled alcoholic liquors; and regulating the sale and service of vinous and malt alcoholic liquors, in the City of Los Angeles."

4. Upon the said 13th day of June, 1922, said petitioner and plaintiff in error was actually in the custody of the Chief of Police of the City of Los Angeles, the respondent and defendant in error, the cause of the detention of said plaintiff in error being an alleged violation of said Ordinance Number 37,699 (New Series) of the City of Los Angeles, and particularly

403 Subdivision (c) of Section 5, and of Section 2 of said ordinance. That a petition in behalf of the plaintiff in error was so filed on the said 13th day of June, 1922, and in said petition plaintiff in error prayed for his release from the detention heretofore described and asked that a writ of habeas corpus be issued, directed to the defendant in error, commanding him to have the body of the plaintiff in error before the
404 District Court of Appeal of the State of California, Second Appellate District, at a time and place therein to be specified, and that the said plaintiff in error be restored to his liberty and discharged from custody.

5. That in said petition filed as aforesaid on the 13th day of June, 1922, in the said District Court of Appeal of the State of California, Second Appellate District, plaintiff in error alleged and set forth that said ordinance under
405 the terms of which he had been arrested and particularly Section 2, and Subdivision (c) of Section 5, were void because they were unconstitutional because they prohibited a legitimate business, and the conduct of the same lawfully in accordance with the regulations of the National Prohibition Act of the United States, (being in violation of the terms of the Fourteenth Amendment to the Constitution of the United States). That plaintiff in error further showed that said ordinance Number 37,699

406 (New Series) of the City of Los Angeles, and particularly Subdivision (c) of Section 5, and Section 2 of said ordinance, contained a prohibition forbidding the filling at pharmacies in the said City of Los Angeles of any prescription of alcoholic liquor in excess of eight ounces, and alleged that said restriction was such as to render said prescriptions thus confined to eight ounces valueless. (Such regulation violating the
407 terms of the Fourteenth Amendment of the Constitution of the United States.)

6. That petitioner further alleged in his petition to said District Court of Appeal of the State of California, Second Appellate District, that the permissive features of the ordinance whereby the sale of wine and beer was legalized, were unconstitutional and void because they were in violation of the terms of the Eighteenth Amendment to the Constitution of the United
408 States and the National Prohibition Act of the United States (41 Statutes-at-large 305) and that the clause in said ordinance Number 37,699 (New Series) of the City of Los Angeles forbidding the filling of prescriptions of alcoholic liquor in excess of eight ounces was rendered void and unconstitutional for the reason that it was in violation of the Eighteenth Amendment and the National Prohibition Act.

7. That on the first day of March, 1923, said District Court of Appeal of the State of Cali-

409 fornia, Second Appellate District, rendered its final judgment against your petitioner and plaintiff in error in the above entitled matter wherein it held that said ordinance under which the petitioner and plaintiff in error was then detained and arrested, particularly Subdivision (c) of Section 5 thereof, and Section 2 thereof, were not void and unconstitutional and in violation of the Fourteenth Amendment and Eighteenth Amendment to the Constitution of the
410 United States and in violation of the National Prohibition Act (41 Statutes-at-large 305). That in said decision and judgment of said District Court of Appeal it was decided that the filling of prescriptions by licensed physicians in the City of Los Angeles could be entirely prohibited and that the restriction of filling of prescriptions to eight ounces, even though rendering said prescriptions valueless and amount-
411 ing to a prohibition, could yet be sustained as a valid and constitutional regulation and prohibition. That said decision thus held that said ordinance and particularly Section 2 thereof, and Subdivision (c) of Section 5 thereof, regulating the filling of prescriptions of alcoholic liquor by pharmacies were not in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States. In the said judgment it was held that said ordinance did not deprive citizens of the United States and

412 of the State of California of rights, privileges and immunities secured to other citizens of the United States and of said state, and did not deny to persons in the State of California the equal protection of the laws and did not deprive any person or persons of life, liberty or property without due process of law, but on the contrary held that said ordinance and said particular sections thereof were not unconstitutional and were not unreasonable and did not offend any pro-
413 visions of the Constitution of the United States, or of the Amendments thereto, or of the National Prohibition Act.

8. That said decision and final judgment of the District Court of Appeal of the State of California adjudged that the use and dispensing of alcoholic liquor for medicinal purposes upon prescriptions of regularly licensed physicians could be entirely suppressed and prohib-
414 ited, and that the business of filling and compounding alcoholic liquor for medicinal purposes and not for beverage purposes could be entirely suppressed and prohibited, and that restrictions so drastic and severe could be imposed upon the selling, filling and compounding of such prescriptions as to render them valueless as medicine and thus prohibit their use as such.

9. That said final judgment and decision of said District Court of Appeal of the State of California denied your petitioner and plaintiff in

415 error the right to be discharged upon a writ of habeas corpus, and remanded the petitioner and plaintiff in error to the custody of the defendant in error, the Chief of Police of the City of Los Angeles, State of California.

10. That the District Court of Appeal of the State of California is the highest court of the State of California in which a decision in this suit could be had, and that its decision and judgment was final and could not be reviewed by any
416 other court or tribunal in the State of California. That there was drawn in question in said suit the validity of an authority by an ordinance exercised under the said State of California, on the ground of it being repugnant to the Constitution and the laws of the United States, and the final decision and judgment of said District Court of Appeal was in favor of the validity of said authority.

417 11. That the adjudication by the said District Court of Appeal of the State of California, Second Appellate District, and its said final judgment and decision, all appear in the record of said cause, denying the discharge of the plaintiff in error on said writ of habeas corpus and remanding him to the custody of the defendant in error.

12. That certain errors were committed in the said decision and judgment of the District Court of Appeal of the State of California,

418 Second Appellate District, all of which appear in detail in the Assignment of Errors filed in this cause with this petition, said judgment, your petitioner shows, was erroneous because of the grounds stated in said Assignment of Errors filed herewith. Said judgment was to the great damage of the plaintiff in error.

WHEREFORE, your petitioner, as plaintiff in error, prays that a writ of error from the Supreme Court of the United States to the Dis-
419 trict Court of Appeal of the State of California, Second Appellate District, may be issued in this cause, to the end that the record in said matter may be removed to the Supreme Court of the United States; that the errors complained of by your petitioner may be examined and corrected and that said judgment be reversed and your petitioner discharged; that a transcript of the record, proceedings and papers in this cause,
420 duly authenticated, may be filed with the Supreme Court of the United States; that your petitioner may have such further and other relief as in the premises may be just.

That your petitioner will ever pray.

Dated: This 18th day of May, 1923.

Merlin W. Hixson
MERLIN W. HIXSON
Petitioner

Ray E. Nimmo
By RAY E. NIMMO
His Attorney.

421 Endorsed: Filed May 18, 1923. W. D. Shearer, Clerk.

[TITLE OF COURT AND CAUSE.]

Order Allowing Writ of Error.

The above entitled matter coming on to be heard upon the petition of the petitioner therein for a writ of error from the Supreme Court of the United States to the District Court of Ap-
422 peal of the State of California, Second Appellate District, Division Two, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,

IT IS ORDERED that a writ of error be, and hereby is, allowed to this court from the
423 Supreme Court of the United States, and that the bond presented by said petitioner be, and the same hereby is, approved.

Finlayson

Presiding Justice of the District Court of Appeal, Second Appellate District, Division Two.

Endorsed: Filed May 19, 1923. W. D. Shearer, Clerk.

424 [TITLE OF COURT AND CAUSE.]

Bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, Merlin W. Hixson, as principal, and T. W. Jones and J. E. Naregan as sureties, are held and firmly bound unto Louis D. Oakes, in the sum of Two hundred-fifty no/100 Dollars, to be paid to the said obligee, his successors, representatives and assigns; to the payment of
425 which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals dated this 18th day of May, A. D. 1923.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by
426 the District Court of Appeal of the State of California, Second Appellate District, Division Two,

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obliga-

tion shall be void; otherwise to remain in full force and effect.

Merlin W. Hixson,
Principal
T. W. Jones,
J. E. Naregan,
Sureties

Signed, sealed and delivered in the presence of:

.....

X.....

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

On this 19th day of May, A. D. 1923, before me, personally appeared Merlin W. Hixson and T. W. Jones and J. E. Naregan, to me known to be the persons described in and who executed the foregoing undertaking, and they acknowledged to me that they executed the same, as their free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said County the day and year in this certificate first above written.

(Seal) W. D. Shearer
Clerk, District Court of Appeal, Second Appellate District, State of California.

430 STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

T. W. Jones and J. E. Naregan, being first duly sworn, depose and say, and each for himself says, that he is worth the full amount named as the penal sum in the foregoing undertaking, over and above his just debts and liabilities and property exempt from execution.

T. W. Jones,

431 (Seal) J. E. Naregan.

Subscribed and sworn to before me this 19th day of May, 1923.

W. D. Shearer
Clerk, District Court of Appeal, Second Appellate District, State of California.

I hereby approve the foregoing bond and sureties this 19th day of May, 1923.

Finlayson
432 Presiding Justice of the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Endorsed: Filed May 19, 1923. W. D. Shearer, Clerk.

433 UNITED STATES OF AMERICA:SS.

MERLIN W. HIXSON, Petitioner and Plaintiff-in-Error, vs. LOUIS D. OAKES, Respondent and Defendant-in-Error.	)	WRIT OF ERROR

The President of the United States of America to the Honorable the Judges of the District Court of Appeal of the State of California,
434 *Second Appellate District, Division Two, Greeting:*

Because, in the record and proceedings, as also in the rendition of the decision and judgment, of a plea which is in the District Court of Appeal of the State of California, Second Appellate District, Division Two, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in said suit between Merlin W.
435 Hixson, petitioner, and Louis D. Oakes, respondent, wherein was drawn in question the validity of an authority exercised under said state of California, namely, an ordinance of the City of Los Angeles, in the County of Los Angeles, in said State of California, on the ground of said ordinance and its provisions being repugnant to the constitution and laws of the United States, and the decision was in favor of the validity of such authority and ordinance, a manifest error hath happened to the great

436 damage of the said Merlin W. Hixson, as by his petition and complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the
437 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 14th day of July, 1923, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

438 Witness, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States this 18th day of May, in the year of our Lord one thousand nine hundred and twenty-three.

(Seal) CHAS. N. WILLIAMS,
Clerk of the District Court of the United States, Southern District of California, Southern Division

R. S. ZIMMERMAN,
Deputy.

Endorsed: Filed May 18, 1923. W. D. Shearer, clerk.

439 IN THE SUPREME COURT OF THE UNITED STATES.

United States of America, ss.

To Louis D. Oakes, Chief of Police of the City of Los Angeles, in the County of Los Angeles, State of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty (60) days
440 from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of Appeal of the State of California, Second Appellate District, Division Two, wherein Merlin W. Hixson is plaintiff in error, and you are the defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be
441 done to the parties in that behalf.

Witnesseth, the Honorable Frank G. Finlayson, Presiding Justice of the District Court of Appeal of the State of California, Second Appellate District, Division Two, this 19th day of May, in the year of our Lord one thousand nine hundred and twenty-three.

FINLAYSON,

Presiding Justice of the District Court of Appeal of the State of California, Second Appellate District, Division Two.

442 Copy of the within citation received this 19 day of May, A. D. 1923, at the office of W. D. McConnell, City Prosecutor of the City of Los Angeles, and attorney for the defendant in error. W. D. McConnell, City Prosecutor of the City of Los Angeles and attorney for the defendant in error By John M. Concannon, Deputy City Prosecutor.

Endorsed: Filed May 21, 1923. W. D. Shearer, Clerk.

443

[TITLE OF COURT AND CAUSE.]

Precipe.

TO THE CLERK OF SAID COURT:

SIR:

Please issue for the record to be included in the transcript with the writ of error, in the above entitled cause, to be certified by you, as

444 a true copy of said record, the following:

Petition of M. W. Hixson for a writ of habeas corpus, filed on the 13th day of June, 1922;

Copy of return of respondent, L. D. Oakes, Chief of Police;

Copy of testimony of all witnesses appearing in this court on the 22nd day of June, 1922;

Copy of opinion and decision of the court, rendered February 28, 1923;

445 Together with all papers filed herein, including petition for writ of error, assignment of error, writ of error, order allowing writ of error, citation, undertaking and prayer for reversal.

Ray E. Nimmo
Ray E. Nimmo
Attorney for Plaintiff in Error.

Endorsed: Received copy of the within
446 precipe, this 19 day May, 1923. W. D. McConnell, city prosecutor; by John M. Concannon, deputy city prosecutor.

Filed May 21, 1923. W. D. Shearer, Clerk.

447

448 [TITLE OF COURT AND CAUSE.]

Clerk's Certificate.

I, W. D. Shearer, clerk of the District Court of Appeal of the state of California, Second Appellate District, Division Two, hereby certify the foregoing transcript, consisting of 149 pages, constitutes a full, true and correct copy of the proceedings had and orders entered in the above entitled cause, as set forth therein; as the same
449 appears on file and of record in this office, with the exception of the writ of error, petition for writ of error, assignment of errors, order allowing the writ of error, [redacted], prayer for reversal herewith attached, at pages 145, and 133 128, 141, 147, respectively, which are the foregoing writ of error, petition for writ of error, assignment of errors, order allowing the writ of error, [redacted] and prayer for reversal.

450 The foregoing constitutes the entire transcript in the cause.

Witness my hand and official seal of said court, this 27th day of June, A. D. 1923.

W. D. SHEARER,

Clerk of the District Court of Appeal of the State of California, Second Appellate District, Division Two.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1923.

No. 420.

Merlin W. Hixson,
Plaintiff in Error,
vs.
Louis D. Oakes,
Defendant in Error.

Brief and Argument on Behalf of Plaintiff in Error.

RAY E. STUBBS,
Counsel for Plaintiff in Error.

SUBJECT INDEX.

PAGE

Authorities on Medicinal Liquor 51
Brief 21
Cases Distinguished 61
Concurring Opinion of Judge Works 65
Constitutional Limitations Upon Police Power 82
Effect of Judicial Sanction of Law Forbidding Prescription for Medicine 68
Introductory Statement 3
Limitations of Police Power 87
Medical Liquor May Not Be Prohibited 77
Medical Prescriptions 41
Ordinance Denies Equal Protection of Law 84
Ordinance Is Void Because Unconstitutional 37
Ordinance Number 37,699 (New Series) 7
Physician and Pharmacist Both Under Control of State Boards 74
Professional Vocations May Not Be Prohibited 93
Specification of Errors 16
Summary 97
Supplement 101
Useful Business May Not Be Suppressed 80

TABLE OF CASES.

PAGE

Adair v. U. S., 208 U. S. 161 ..... 34, 36
Adams v. Tanner, 244 U. S. 590 71
Adkins v. Children's Hospital, 261 U. S. 525 ..... 34, 87, 88, 89
Allgeyer v. Louisiana, 165 U. S. 578 ..... 33, 34
American School v. McAnnulty, 187 U. S. 94 66
Atchison, Top. & St. Fe Ry. Co. v. Vosburg, 238 U. S. 56 85
Ball v. State, 50 Ind. 595 59
Biggs, State v., 133 N. C. 729 66
Bowman v. State, 40 S. W. (Tex.) 796 52
Butchers' Union Co. v. Crescent City Co., 111 U. S. 746 34
Carter v. Coleman, 84 Ala. 256 97
Collins v. Texas, 223 U. S. 288 28
Coppage v. Kansas, 236 U. S. 1 34
Cowert, *Ex Parte*, 9 So. (Ala.) 225 54
Crane v. Johnson, 242 U. S. 339 28
Dent v. West Virginia, 129 U. S. 114 28
Dobbins v. Los Angeles, 195 U. S. 223 31
Donnell v. State, 2 Ind. 658 59
Durein, State v., 70 Kan. 1 61
Eastman v. State, 109 Ind. 278; 10 N. E. 97 66
Ex Parte Jentzsch, 112 Cal. 468 25
Erickson, Peo. v., 147 N. Y. Supp. 226 35
Fowler, Com. v., 96 Ky. 166; 28 S. W. 786 51
Geiger-Jones v. Turner, 230 Fed. 233 84
Gravett, State v., 65 O. St. 289, 62 N. E. 325 66
Gray v. Connecticut, 159 U. S. 74 ..... 70, 73
Greensboro v. Ehrenrick, 80 Ala. 579 82
Hall v. Moran, 89 So. (Fla.) 104 ..... 91, 92
Hewitt v. Board Med. Exmrs., 148 Cal. 590 35
Hixson, *in re*, 40 Cal. App. Dec. 521 6
Hooper v. State, 56 Ind. 153 59
Indiana Bd. Phar. v. Haag, 184 Ind. 333 74
Jakes v. State, 42 Ind. 473 59

PAGE

Kumpfert, State v., 115 La. 950 73
Lambert v. Yellowley, 291 Fed. 640 ..... 45, 72
Larrimore, State v., 19 Mo. 391 57
Lawton v. Steele, 152 U. S. 133 27
Liffring, State v., 61 O. St. 39; 55 N. E. 168 66
Lochner v. New York, 198 U. S. 45 ..... 34, 88
Louisiana St. Board v. Carpentier, 140 La. 40; 73 So. 248 66
Marymont v. Banking Bd., 33 Nev. 333 94
McNaughton v. Johnson, 242 U. S. 344 28
McNulty v. Toopf, 106 Ky. 202; 75 S. W. 58 54
Meyer v. State, 17 U. S. Sup. Ct. Adv. Opin. 699 89
Minnesota State Phar. Assn. v. St. Board, 103 Minn. 21 73
Motlow v. State, 125 Tenn. 547 61
Muller v. Oregon, 208 U. S. 412 34
National Prohibition Cases, 253 U. S. 350 76
New York Life Ins. Co. v. Dodge, 246 U. S. 357 34
Nixon v. State, 76 Ind. 524 58
Purity Extract Co. v. Lynch, 226 U. S. 192 ..... 22, 41, 69
Saarls v. Com., 83 Ky. 327 55
Selma, Town of, v. Brewer, 9 Cal. App. 70 43
Smith, *in re*, 143 Cal. 368 31
Smith, State v., 25 Ida. 541; 138 Pac. 1107 66
State v. Peel Splint Coal Co., 36 W. Va. 856 ..... 32, 56
Steele, Peo. v., 231 Ill. 340 35
Taft, State v., 118 N. C. 1190 80
Thomasson v. State, 15 Ind. 449 59
U. S. v. Freund, 290 Fed. 411 47
Watson v. Maryland, 218 U. S. 173 28
Weiner, Peo. v., 271 Ill. 74 35
Whitwell, *Ex Parte*, 98 Cal. 73 ..... 28, 29
Wray, State v., 72 N. C. 253 56
Youngblood v. Birmingham Trust Co., 95 Ala. 521 .. 97
Young's Case, 101 Va. 853 24
Zany, Matter of, 164 Cal. 724 11

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1923.

No. 420.

Merlin W. Hixson,
Plaintiff in Error,
vs.
Louis D. Oakes,
Defendant in Error.

Brief and Argument on Behalf of Plaintiff in Error.

INTRODUCTORY STATEMENT.

This is a writ of error, directed to the District Court of Appeal of the state of California, Second Appellate District, to review a decision of that court by which the plaintiff in error, Merlin W. Hixson, was refused a discharge upon a writ of habeas corpus, and was re-

manded to the custody of the defendant in error, who was chief of police of the city of Los Angeles, California.

The plaintiff in error was, and is, a registered pharmacist, licensed under the appropriate law of the state of California to compound prescriptions for physicians and was arrested and charged in the police court of the city of Los Angeles with the violation of an ordinance of that city, prohibiting the sale of intoxicating liquor upon the prescription of a physician, in excess of eight ounces in any single prescription.

The defendant Hixson, plaintiff in error in this court, was tried and convicted, and after the judgment of conviction had been sustained in the Superior Court of Los Angeles county, a petition for a writ of habeas corpus was filed in the District Court of Appeal, Second Appellate District, of California. After argument had been made, however, the court discharged the writ and remanded the petitioner to the custody of the chief of police to whom said writ was directed.

The questions involved are federal questions, namely, whether, under the guarantees of the Federal Constitution, the prescription of intoxicating liquor by physicians as medicine may be prohibited, or the quantity of intoxicating

liquor prescribed medicinally by physicians may be limited otherwise than as dictated by the sound discretion of the physician, and whether there has been an invidious discrimination made between the regulations imposed upon the prescription of intoxicating liquor and those of other medicines.

STATEMENT OF THE CASE.

The plaintiff in error was engaged in the retail drug business in the city of Los Angeles, and was arrested and charged with the violation of an ordinance of the city of Los Angeles by which the sale of intoxicating liquor was regulated, and the sale for medicinal purposes, in quantities in excess of eight ounces, was forbidden.

Upon the 13th day of June, 1922, said petitioner was in the custody of the chief of police of the city of Los Angeles, the cause of his detention being the alleged violation of said ordinance, Number 37,699 (New Series), of the city of Los Angeles, and particularly section 2 and subdivision (c) of section 5 of said ordinance. [Tr. p. 13.] A petition for the discharge of the defendant, who is the plaintiff in error here, was filed on said 13th day of June, 1922, and a writ of habeas corpus was issued by the District

Court of Appeal of the state of California, commanding the chief of police, the defendant in error, to produce the body of the petitioner before that court on a later date. Upon the issuance of the writ, said plaintiff in error was released on bail, and thereafter evidence was taken by the said District Court of Appeal, for the purpose of determining whether the prescription of alcoholic liquor was, or was not, indispensable in the treatment of certain cases by physicians, and whether a limitation of such a prescription to eight ounces did, or did not, render such a prescription valueless.

Thereupon said District Court of Appeal took the case under advisement, and upon the 28th day of February, 1923, rendered its opinion sustaining its decision that, without reference to the questions for the determination of which evidence was taken, the city of Los Angeles, under the police power delegated to it in its charter, could, in the exercise of that police power, forbid entirely the sale of intoxicating liquor for medicinal purposes. The decision is found in 40 Cal. App. Decisions, 521 (not Cal. App. Reports). [Tr. p. 91.] The writ of habeas corpus was thereupon discharged and the petitioner remanded to the chief of police.

Counsel for the respondent, chief of police, argued that the city had the power to prohibit

the sale of intoxicating liquor for any purpose, medicinal or otherwise, under its police power, and that the broad right of physicians to prescribe such liquor as medicine could be abridged and taken away.

Thereafter, and on the 18th day of May, 1923, petition for writ of error, to be directed by this court to the said District Court of Appeal, was presented to the Hon. Frank J. Finlayson, presiding justice of said court, in the Second Appellate District, Division Two, and thereupon the writ was allowed, was issued in due form and directed to the judges of the said District Court of Appeal of the state of California, in accordance with the statute, requiring the said court to certify a record of its proceedings to this court, for review and the correction of errors.

In order that the questions involved may be properly considered and intelligently discussed, those portions of Ordinance Number 37,699 (New Series), essential for such purposes, are set forth. Sections 1, 2, 3, 4, 5 and 13 of said ordinance read as follows:

"Section 1. It shall be unlawful to establish, maintain or conduct within the city of Los Angeles any saloon, barroom, wholesale liquor establishment, malt bottling liquor establishment, brewery, winery, hotel, cafe, restaurant, club, association or other place, in which, or in

connection with which, alcoholic liquor is sold, served or given away, except as hereinafter provided. Each day that any such place is established, maintained or conducted shall constitute a separate offense.

Sec. 2. It shall be unlawful to sell, serve or give away any alcoholic liquor within the city of Los Angeles, except as hereinafter provided.

Sec. 3. It shall be unlawful within the city of Los Angeles to solicit any order for any alcoholic liquor; and it shall be unlawful to accept an order for any such liquor anywhere, except in a place where such liquor may be legally sold.

Sec. 4. It shall be unlawful to have, keep or maintain any alcoholic liquor in any place of public resort, or upon the premises of any club or association within the city of Los Angeles, other than a place where such liquor may legally be sold or served, provided that this shall not apply to the keeping of alcohol for scientific or mechanical purposes.

It shall also be unlawful for the proprietor or manager of any place of public resort, club or association where any alcoholic liquor may not legally be sold to permit therein the drinking of any such liquor.

Sec. 5. Nothing in the preceding sections of this ordinance shall be construed as rendering unlawful

(a) The service of alcoholic liquors in a private home to members of the family or to guests, when such home is not a place of public resort, and when no money or other representative of value or any valuable consideration, is, or is to be, given or received in return therefor.

(b) The distribution and use of wine at the sacramental service of any religious organization;

(c) The filling only, at pharmacies, on the date of issuance, but not the refilling, of prescriptions calling for not to exceed eight ounces of alcoholic liquor each. Every such prescription shall be issued, signed and dated by a duly licensed physician, and shall have endorsed upon it by such physician the name and the address of the person for whose use such prescription is made and the statement that in his opinion the liquor prescribed is required by such person as a medicine. No other form of prescription shall be deemed to be within the intent of this section. All alcoholic liquor so dispensed shall be placed in corked or sealed bottles and delivered to the purchaser in the public room of the pharmacy or sent to any given address, but shall not be consumed on the premises where dispensed. All such prescriptions shall be kept on file for one year and open at all times to public inspection while the pharmacy is open for business.

(d) The sale of pure alcohol by registered pharmacists at pharmacies for scientific or mechanical purposes, but not for drinking; provided the pharmacist selling the same shall keep a record of such sales in which shall be entered the date of the sale, the quantity sold, the purpose for which purchased, and the signature of the person purchasing the same; such record to be kept at said pharmacy for at least one year, open to public inspection at all times during regular business hours;

(e) The sale between seven a. m. and six p. m. of any day, except a legal holiday, of not less than one-fifth of a gallon of vinous and malt alcoholic liquors in sealed or corked containers or closed packages at any place situated within the liquor zone described and bounded herein, the proprietor or manager of which

place holds a valid license, obtained as is now or shall hereafter be provided by ordinance, authorizing the sale of such liquors, and all such containers or packages shall be marked with the name of the liquor contained therein, and delivered to the purchaser or sent to any given address, within or without said liquor zone, but shall not be consumed on the premises where sold.

(f) The service of vinous and malt alcoholic liquors in any club, restaurant or hotel, situated within the liquor zone described and bounded herein, the proprietor or manager of which club, restaurant or hotel holds a valid license, obtained as is now or shall hereafter be provided by ordinance, authorizing the sale or service of such liquors at such place. Such service shall only be made to persons partaking of bona fide meals, for consumption with such meals, in a public or general dining room, to which dining room free accesss is allowed to all police and other peace officers at all times when such room is being used. Such service shall only be made in a dining room large enough and sufficiently furnished to accommodate twelve or more guests at one time, and so free from curtains, booths, or other obstructions that guests in one part of the room shall have clear view of guests in all other parts thereof. Such service shall only be made between the hours of eleven o'clock a. m. and nine o'clock p. m. of any day; and if the dining room of such club, restaurant or hotel is kept open after nine o'clock p. m. of any day, all bottles, glasses and other vessels containing alcoholic liquor shall be removed from such dining room immediately after such hour of nine p. m.

(g) The sale of alcoholic liquors by wholesale drug store liquor establishments to registered pharmacists, when delivered at pharmacies and at no other place.

Sec. 13. Any violation of this ordinance shall constitute a misdemeanor, and shall be punishable by a fine not to exceed five hundred dollars ($500) or by imprisonment in the city jail of Los Angeles for a period not to exceed six (6) months, or by both such fine and imprisonment."

Ordinance Number 37,699 (New Series) is locally known as the Gandier Ordinance, and is so designated in the opinion of the District Court of Appeal.

A final judgment or decision upon an application for a writ of habeas corpus to the District Court of Appeal of the State of California cannot be reviewed, on appeal or otherwise, by any court within that state, and the District Court of Appeal is the highest court in which a decision upon an application for a writ of habeas corpus, made to it, can be had.

Matter of Zany, 164 Cal. 724.

The opinion of the District Court of Appeal appears on page 91 *et seq.* of the transcript of the record herein, and reference is made thereto, but for the purpose of emphasizing the position taken by the District Court of Appeal in reaching its decision, the following is taken from the opinion:

"Petitioner claims that when all of the provisions of the National Prohibition Act are read together that law must be construed as meaning that but one prescription may be issued to the same person within the ten-day period, regardless of whether such prescription calls for a pint or for less than a pint. For the purpose of this decision, but for the purpose of this decision only, we shall assume that in this respect petitioner's construction of the Volstead act is correct.

"At a hearing had before this court on the return made to our writ of habeas corpus, six physicians were examined as expert witnesses for the purpose of aiding us in determining the medicinal value of alcoholic liquors. All of them agreed that such liquors do possess some medicinal value. Some of the physicians testified that there are certain substitutes for alcoholic liquors which make the use of such liquors unnecessary and even undesirable. Others testified that in their opinion there is no substitute which can effectually take the place of alcoholic stimulants in certain cases, as in pneumonia, for example. Of these latter witnesses two or three testified that not even a pint of whiskey in ten days (the maximum amount permitted by the Volstead act) would be sufficient in some cases.

"(1) Petitioner's principal contention is that while a state or a political subdivision thereof, in the exercise of its police power, may regulate the sale of alcoholic liquors for medicinal uses, it cannot prohibit their sale for such uses. This proposition constitutes the major premise of petitioner's

argument on his first point. He argues that the restrictions in the Gandier ordinance, when taken in conjunction with those in the Volstead act, so limit the amount of alcoholic liquor which pharmacists in the city of Los Angeles may now sell in filling prescriptions that the combined effect of the operation of the ordinance and the national act has been to prohibit the sale in Los Angeles of an amount of alcoholic liquor sufficient to serve the purposes of medicine. That is to say, though the Gandier ordinance does not forbid the issuance of more than one prescription to the same person in any period of ten days, it does make it an offense for a pharmacist to fill any single prescription calling for more than eight ounces; and under petitioner's construction of the Volstead act no physician is allowed to issue more than one prescription for the same person in any ten-day period. Therefore it is claimed that the practical effect of the combined operation of the national act and the city ordinance is to make it unlawful for a licensed pharmacist in the city of Los Angeles to sell to any one person, on a physician's prescription, more than eight ounces of alcoholic liquor in any period of ten days, which amount, it is claimed, is so small as to be valueless for medicinal purposes. Assuming, without conceding, that such is the result of the operation of the city ordinance and the national law, we still do not think that the ordinance has been rendered unreasonable. *For reasons presently to be stated, we think that the ordinance would not have been unreason-*

ordinance and void if it had entirely prohibited the sale of alcoholic liquor as a medicine. And if the city possessed the power entirely to prohibit its sale as a medicine, then, a fortiori, the limitation to eight ounces in ten days would not have been an unreasonable restriction. (Italics ours.)

"It may be said *in limine* that if the argument whereby petitioner would strike down the city ordinance be tenable, then his argument would seem to be equally fatal to the national enactment, in so far as the prescription of alcoholic liquor for medicinal use is concerned. For, according to the testimony of petitioner's medical experts, the maximum amount which it is assumed the Volstead act permits to be prescribed—one pint, or sixteen ounces, in ten days—has but little, if any, more medicinal value than would be possessed by eight ounces administered in the same period of time; and neither amount, according to those witnesses, is sufficient to meet the exigencies of certain cases, as, for example, where the patient has been stricken with pneumonia. But waiving this consideration, and assuming that the restriction which the Volstead act imposes on the prescription and sale of spirituous liquors for medicinal use is within the authorized powers of Congress under the eighteenth amendment—and we are fully convinced that it is—and assuming also that petitioner's construction of the National Prohibition Law is correct, *still we do not agree with his premise that a municipal corporation, in the exercise of its police power, may not absolutely prohibit the sale of alcoholic liquor as a medicine.*"

* * * * * * *

"From the principles underlying the foregoing cases it is apparent that though the sale of alcoholic liquors for medicinal purposes may not be in itself noxious, nevertheless the city of Los Angeles could have prohibited such sales because of the great opportunity afforded thereby for aiding those whose purpose and desire is to violate those provisions of the ordinance which prohibit the sale of intoxicants as beverages. Legislation prohibiting the sale of alcoholic liquor for medicinal use might be repugnant to our sense of justice, or it might even be regarded as unnecessarily oppressive to those desiring to use alcoholic liquor for that purpose; but if that is all which may be said against it, the appeal must be to the legislature or to the ballot box, but not to the judiciary." (Italics ours.)

* * * * * * *

"(3) Concluding, as we do, that the city of Los Angeles, had it chosen to exercise the power, might have prohibited in the first instance all sales of alcoholic liquor as a medicine, it cannot be held that the city's restriction upon the filling of prescriptions by pharmacists has been so far augmented by the National Prohibition Law that it has now become unreasonable and void."

No effort was made in the state court by the defendant in error here to assert that the eighteenth amendment to the Constitution of the United States was applicable, *but the contention of counsel, as well as that of the deciding tribunal, was that the right to prohibit for*

medicinal purposes was as complete as the right to prohibit for beverage purposes, as such right had been adjudicated and determined prior to the enactment of the eighteenth amendment.

Other questions were raised in the state court but the broad Federal questions, whether the right of the physician to prescribe intoxicating liquor for medicinal purposes and a pharmacist to fill such prescriptions, were constitutional and inviolable, were the principal questions presented.

It was contended by the plaintiff in error that the limitation of the prescription of alcoholic liquor to the quantity of eight ounces rendered the prescription valueless, and therefore, amounted to a prohibition. The court decided that, assuming such to be the fact, nevertheless the prohibition was not destructive of the guarantees furnished in the organic law, and that the state and its political subdivisions had the right, inherently under the police power, to prohibit the prescription of intoxicating liquor as medicine.

SPECIFICATION OF ERRORS.

The assignment of errors filed herein and set forth at page 128 *et seq.* of the transcript, states the errors relied upon and they are herewith submitted to comply with Rule 21 of this court.

1. The court erred in holding that Ordinance Number 37,699 (New Series), of the City of Los Angeles, in the County of Los Angeles, State of California, and subdivision (c) of section 5 thereof, are not in conflict with the Fourteenth and Eighteenth Amendments to the Constitution of the United States and the National Prohibition Act of the United States, for the reason that the said city of Los Angeles assumes the right, and seeks, to deprive plaintiff in error and other citizens of the United States and of the state of California of rights, privileges and immunities secured to other citizens of the United States and said state, and to deprive plaintiff in error and other citizens of liberty and property without due process of law and to deny plaintiff in error and other citizens within the jurisdiction of the state of California the equal protection of the law, and to modify and change the provisions of the National Prohibition Act, and to prohibit that which the National Prohibition Act expressly permits.

2. The court erred in holding that by the provisions of said ordinance the plaintiff in error is not deprived of rights and privileges and immunities secured to other citizens of the United States and of the state of California by the Constitution of the United States and its laws.

3. That the court erred in holding that the sale of alcoholic liquor as a medicine could be entirely forbidden and prohibited.

4. That the court erred in holding that the state of California or the city of Los Angeles could by reason of their police power prohibit all traffic in intoxicating liquor for any purpose.

5. That the court erred in holding that the said Ordinance Number 37,699 (New Series) of the City of Los Angeles was valid in its restriction of the use of intoxicating liquor for medical purposes.

6. That the court erred in holding that the said Ordinance Number 37,699 (New Series) did not contravene the provisions of the National Prohibition Act of the United States of America (41 Statutes-at-Large, 305).

7. That the court erred in holding that the said ordinance and the authority exercised thereunder and thereby were within the police powers of the said city of Los Angeles.

8. That the court erred in holding that the prohibition of the sale of intoxicating liquor as medicine would not abridge an inalienable and constitutional right of the plaintiff in error to pursue a lawful vocation in a lawful way

without interference by the said city of Los Angeles and the state of California.

9. That the court erred in holding that said Ordinance Number 37,699 (New Series) did not discriminate unlawfully between those filling prescriptions for alcoholic liquors and those filling prescriptions for drugs and other curative agencies.

10. That the court erred in holding that the provisions of said ordinance do not cast specific burdens upon those engaged in filling prescriptions of alcoholic liquors in that said prescriptions are rendered valueless and said business destroyed.

11. That the court erred in holding that restrictions upon the sale and dispensing of intoxicating liquors as medicine could be made to such an extent as to become prohibitive and could thus confiscate and destroy the business of filling prescriptions as medicine.

12. That the court erred in holding that the provisions of said ordinance of the said city of Los Angeles are uniform in their operation and do not discriminate between classes of persons unjustly and unconstitutionally.

13. That the court erred in holding that prescriptions of alcoholic liquor for medicinal purposes, issued by regularly licensed physi-

cians, could be prohibited without reference to the good or bad faith of the physician issuing the same and that alcoholic liquor as a curative agency could be removed entirely and its use forbidden.

14. That the court erred in holding that the provisions of subdivision (c) of section 5 of said ordinance regulating the filling of prescriptions of intoxicating liquor had not been rendered unconstitutional by virtue of the terms of the Eighteenth Amendment to the Constitution of the United States and the National Prohibition Act of the United States, by which the remaining portions of said ordinance of the city of Los Angeles were rendered unconstitutional and void.

15. That the court erred in holding that the city of Los Angeles could enforce an ordinance modifying and limiting the provisions of the Volstead act by which physicians are permitted to prescribe for patients certain forms of intoxicating liquor.

16. The court erred in ordering judgment to be entered denying plaintiff in error his discharge upon a writ of habeas corpus and remanding him to the custody of the defendant in error.

BRIEF OF PLAINTIFF IN ERROR.

I.

Businesses, Professions and Vocations of a Useful Character, Established by Custom and the Sanction of Intelligent People, and Universally Determined Essential to a Community's Well Being, May Not Be Suppressed Nor Unreasonably Restricted.

In opening his argument, plaintiff in error feels impelled to note and discuss first the elementary principles governing the application of the police power of the sovereign states to the property and persons of the subjects of such sovereignties, and the purposes for which, and the principles under which, that power has developed and expanded. The police power is not an unlimited attribute of sovereignty which may be applied indiscriminately and without regard to its particular application. Each state had an inherent right to control its subjects, but in so far as the Constitution of the United States has afforded certain guarantees and immunities, the sovereign power of the state over its subjects has been to that extent abridged.

Whether the police power may be applied to prohibit any particular activity or business depends upon the manner in which it is sought to be applied, whether the instrument used,

namely, the law designed for that purpose and enacted, has a just and appropriate relation to the end sought, and whether the activity or business intended to be prohibited has a salutary and useful character, that is, whether it is an essential and otherwise lawful business, or whether, on the contrary, it is one susceptible of abuse or is of a noxious, deleterious or dangerous character.

In its opinion, the District Court of Appeal of California gave as authority for its conclusion that the sale of intoxicating liquor for medicinal purposes could be suppressed under the police power, the principles enunciated by Mr. Justice Hughes in the case of Purity Extract Co. v. Lynch, 226 U. S. 192. The court, it will be noted, referred to the Purity Extract case and borrowed certain of the language thereof for inclusion in its opinion.

The California tribunal, quoting from the Purity Extract case, said:

> " 'That the state in the exercise of its police power may prohibit the selling of intoxicating liquors is undoubted. (Citing authorities.) It is also well established that when a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem neces-

> sary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. (Citing authorities.) With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended.' "

It is the contention of plaintiff in error that this language is in no sense appropriately applied to the case at bar. It is true that this court said that where a state undertakes to suppress a public evil it may adopt reasonable measures to that end and it does not follow because a transaction is innocuous it may not be included in the prohibition. In the language thus used, it is obvious that this court did not have in contemplation the suppression of a necessary, established, useful and wholly expedient purpose such as the prescription of medicine for the healing of the sick, the alleviation of pain, or the infusion of strength into wasted bodies. In the Purity Extract case the substance or beverage which was prohibited was non-intoxicating, and was described by this court as "in-

nocuous", *but the underlying fact is that its sale served no useful purpose and was not an essential feature of commerce.* There is, therefore, a wide distinction between the suppression of the "innocuous" beverage in the Purity Extract case, and the interference with the discretion of a physician and the prohibition of medical prescriptions, such as is attempted in the instant case.

Not every business which includes within its activities the use of some dangerous instrumentality may be prohibited. In modern days automobile traffic has become a menace to the use of highway crossings by pedestrians, and yet, while such traffic may be regulated, it may not be suppressed nor prohibited.

The liberty guaranteed by the Fourteenth Amendment to the Constitution of the United States has been defined in a notable decision of the Supreme Court of the State of Virginia (Young's case, 101 Va. 853) to mean more than mere freedom from restraint. In its opinion, the Virgina court said:

> "The word 'liberty', as used in the Constitution of the United States, has frequently been construed, and means more than mere freedom from restraint. It means not merely the right to go where one chooses, but to do such acts as he may

judge best for his interest, not inconsistent with the equal rights of others; that is, to follow such pursuits as may be adapted to his faculties, and which will give him the highest enjoyment. The liberty mentioned is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purpose above mentioned. These are individual rights, formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which begins with the fundamental proposition that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."

In the case of Ex parte Jentzsch, 112 Cal. 468, the California Supreme Court said that our government is not paternal in form, and continuing:

"We are a self-governing people, and our just pride is that our laws are made by us as well as for us. Every individual citizen is to be allowed so much liberty as may exist without impairment of the equal rights of his fellows. Our institutions are founded upon the conviction that we are not only capable of self-government as a community, but what is the logical neces-

sity, that we are capable, to a great extent, of individual self-government. If this conviction shall prove ill-founded, we have built our house upon sand. The spirit of a system such as ours is, therefore, at total variance with that which, more or less veiled, still shows in the paternalism of other nations. It may be injurious to health to eat bread before it is twenty-four hours old, yet it would strike us with surprise to see the legislature making a crime of the sale of fresh bread. We look with disfavor upon such legislation as we do upon the enactmen of sumptuary laws. We do not even punish a man for his vices, unless they be practiced openly, so as to lead to the spread of corruption, or to breaches of the peace, or to public scandal. In brief, we give to the individual the utmost possible amount of personal liberty, and, with that guaranteed him, he is treated as a person of responsible judgment, not as a child in his nonage, and is left free to work out his destiny as impulse, education, training, heredity, and environment direct him.

"So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds, affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant."

The language of this court, found in the case of Lawton v. Steele, 152 U. S. 133, expresses a cardinal rule touching the right of a state to interfere with private business. This expression of Mr. Justice Brown is found reiterated in opinions of many courts of last resort since the date of that decision:

> "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words its determination as to what is a proper exercise of its police power is not final or conclusive but is subject to the supervision of the courts."

The treatment of the sick, of course, is recognized as a legitimate occupation and the dignity of the medical profession, its development through the recent decades, its necessity to the well being of the community, are facts which are indisputable. Epidemics of disease have been suppressed, unhealthful localities have been rendered healthful, and sanitary regulations have been devised and enforced solely through the scientific accomplishment of the medical profession.

Indeed, the states have recognized the necessity of having competent persons in this field of activity and have decreed that all such persons

desiring to practice the profession of medicine and surgery should fit themselves by training, study and experience for such practice, and state regulations imposing the necessity of taking examinations and demonstrating their fitness for practice have enforced requirements upon practitioners in this field.

Dent v. West Virginia, 129 U. S. 114;
Watson v. Maryland, 218 U. S. 173;
Collins v. Texas, 223 U. S. 288;
Ex parte Whitwell, 98 Cal. 73;
Crane v. Johnson, 242 U. S. 339;
McNaughton v. Johnson, 242 U. S. 344.

In the state of California a physician and surgeon, maintaining a hospital for the treatment of insane persons and inebriates, in the county of San Mateo, was prosecuted for noncompliance with an ordinance which provided that before a license for the maintenance of such institution could be obtained it must be first established that the building designated in the application for the license was fireproof, was not more than two stories in height, that it and its surrounding land were enclosed within a brick wall at least eighteen inches thick and twelve feet in height, and that there should be but one opening in said wall, and that no such premises should be maintained within four hundred yards of any dwelling or school. In contesting the question of the constitutionality of

this ordinance the matter reached the Supreme Court of the state and there the ordinance was declared invalid and unconstitutional, because of its unnecessarily drastic provisions imposed upon a legitimate and necessary occupation.

Ex parte Whitwell, *supra.*

The California court in discussing this subject matter said:

> "But it is not true that when this power is exerted for the purpose of regulating a business or occupation, which in itself is recognized as innocent and useful to the community, the legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession. As the right of the citizen to engage in such a business or follow such a profession is protected by the constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power."
>
> * * * * * * *
>
> "The state may, of course, make proper laws for the care, government and safekeeping of the unfortunate insane within its limits. This duty it owes, not only to those who are thus rendered incapable of taking care of themselves, but also to the community at large, the members of which are entitled to protection from the acts of persons not subject to the commands of reason."
>
> * * * * * * *
>
> "The business therefore of conducting a private asylum, in which proper care can

be given to such persons by a member or members of the medical profession having experience and special skill in the treatment of such cases, is a necessary and humane one; and the right to maintain such an asylum or hospital, and to follow and practice this particular branch of the medical profession, can not be prohibited or burdened with unreasonable and oppressive conditions."

* * * * * * *

"It is possible that the maintenance of such an asylum would be to some persons in its vicinity disagreeable and annoying, in the sense that it would be more or less repulsive to them; but this is not enough to justify a regulation like that under consideration. There are many unpleasant and even annoying things which must be borne by persons living in a state of organized society, in order that others may also enjoy their equal rights under the law."

* * * * * * *

"It is competent for the court to determine whether any particular regulation of a useful business or occupation is a reasonable restriction upon the constitutional right of the citizen to engage in such business or follow such occupation. *The business of maintaining a private asylum for the treatment of mild forms of insanity and persons afflicted with other diseases named in the ordinance before us, is a lawful one which cannot be prohibited either directly or indirectly.*"

The foregoing decisions and the conclusions properly deduced from them all tend to the same

general end, that no business or profession, of recognized usefulness, can be unnecessarily interfered with.

It is fundamental that the right to render service and the right to enjoy the reward thereof are natural rights which may not be unreasonably abridged by legislation. It is beyond the scope of the police power and not within the sovereign right of any state to prohibit persons from engaging in occupations or employments that are useful and necessary. There must be some clear, real and substantial connection between the purpose of an enactment to enforce the police power and the actual provisions thereof, and the provisions must in some appreciable and appropriate manner tend toward the accomplishment of the object for which the police power is asserted and exercised.

The expression taken from Lawton v. Steele, *supra,* is quoted with approval in Dobbins v. Los Angeles (195 U. S. 223), and the expression of the California Supreme Court in *In re* Smith (decided May 31, 1904, 143 Cal. 368), was quoted by this court with approval, as follows:

> "But, running current with this principle, and to be read with it, is one of equal importance, namely, that when the police power is exerted to regulate a useful business or occupation, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business or vocation, which in itself is recognized as innocent and useful to the community. It is always a judicial question if any particular regulation of such right is a valid exercise of police power, though the authority of the courts to declare such regulation invalid will be exercised with the utmost caution, and only where it is clear that the ordinance or law declared void passes the limits of the police powers, and infringes upon rights guaranteed by the constitution."

Mr. Watson, in his work on the United States Constitution, treating of the Fourteenth Amendment, has quoted from the opinion in the case of State v. Peel Splint Coal Co., 36 West Va. 856, to describe the word "liberty" as used in the amendment:

> "The word 'liberty', as used in the Fourteenth Amendment, does not mean simply exemption from bodily imprisonment, but liberty and freedom to engage in lawful business, and to make lawful contracts therein, to the ends of earning a livelihood for self and family, and of acquiring and enjoying property, and of obtaining happiness.

> "Elsewhere this great right is recognized in the Constitution by the provision that contracts made in its exercise shall not be impaired. It is a privilege essential to earn bread and secure happiness. Vain would be the pursuit of happiness if the right of contract necessary to secure the bread of life and raiment and home were taken away. Scarcely any of the great cardinal rights are more universally recognized and vindicated under our system, indeed, under all civilized governments, than this right of contract. *A man must have the right to exercise his skill and talents and dispose of and use his labor and property, and lawful pursuits as to him shall seem proper. The property right may be violated by prohibiting its full use to the owner as effectually as by taking it from him, his ownership being thus damaged.*" (Italics ours.)

And this court, in Allgeyer v. Louisiana, 165 U. S. 578, described the Fourteenth Amendment to mean something more than mere freedom from physical restraint, saying:

> "The liberty mentioned in that amendment means not only the right of a citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avoca-

> tion, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

And, as said in Watson on the Constitution, the whole doctrine is admirably epitomized by Mr. Justice Swayne in his dissenting opinion in the Slaughter House cases:

> "Liberty is freedom from all restraints but such as are justly imposed by law Beyond that line lies the domain of usurpation and tyranny."

The right to contract about one's affairs was said by Mr. Justice Sutherland, in Adkins v. Children's Hospital, 261 U. S. 525, to be a part of the liberty of the individual, protected by the Fifth and Fourteenth Amendments to the Constitution. This proposition is well settled by the decisions of this court:

> Allgeyer v. Louisiana, 165 U. S. 578;
>
> New York Life Insurance Company v. Dodge, 246 U. S. 357;
>
> Coppage v. Kansas, 236 U. S. 1;
>
> Adair v. United States, 208 U. S. 161;
>
> Muller v. Oregon, 208 U. S. 412;
>
> Lochner v. New York, 198 U. S. 45;
>
> Butchers' Union Co. v. Crescent City Co., 111 U. S. 746.

That the right to practice medicine is a valuable right, in the nature of property, which cannot be taken away except under such process as may afford the owner of such a right a complete hearing, has been established in many jurisdictions. As said by the Supreme Court of the State of California, in Hewitt v. Board of Medical Examiners, 148 Cal. 590:

> "The right to practice medicine is, like the right to practice any other profession, a valuable property right, in which, under the constitution and laws of the state, one is entitled to be protected."

Under the Federal and State Constitutions, it was said in the case of People v. Weiner, 271 Ill. 74:

> "The individual may pursue without let or hindrance all such callings or pursuits as are innocent in themselves and not injurious to the public. These are fundamental rights of every person living under this government and the legislature by its enactments cannot interfere with such rights."

See also:

Peo. v. Steele, 231 Ill. 340;

Peo. v. Erickson, 147 N. Y. Supp. 226.

By act of Congress of January 1, 1898, carriers engaged in interstate commerce were prohibited from discriminating against employees

because of membership in labor unions. In its discussion of the validity of this statute, this court (Adair v. U. S., 208 U. S. 161), expressed its opinion that such a provision was an invasion of the personal liberty, as well as the right of property, guaranteed by the Fifth Amendment to the Constitution. The court said:

> "Such liberty and right embraces the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interest or as hurtful to the public order, or as detrimental to the common good."

Then, summing up the effect of these adjudications, it may safely be said that no regulation amounting to a prohibition may be imposed upon a useful and necessary occupation. That the sale of intoxicating liquor as a traffic is fraught with danger to the community is recognized by all classes; that it is an acknowledged subject of legislation, and that all activities coupled with it may be regulated to the same end, is indubitably settled; yet it would indeed be an alarming step for the legislature to enact, or for the courts to sustain, a fiat destroying

the right of physicians to prescribe medicine. Such a law would strike down the very principles upon which our system of government has been founded, destroy the fabric of our constitutional theories and undermine the structure of business and trade.

II.

The Ordinance Is Void for the Reason That It Deprives Plaintiff in Error of His Liberty and Property Without Due Process of Law; It Abridges His Privileges and Immunities as a Citizen of the United States.

In his assignment of errors, plaintiff in error specified the many errors complained of, but, as several of these are directed mainly to the same constitutional question, we deem it sufficient to direct our argument to those errors embraced in specifications numbered Eleven and Thirteen.

Plaintiff in error complains that the District Court of Appeal erred in holding that the restriction of the sale and dispensing of intoxicating liquor as medicine could be made to such an extent as to become prohibitive and could thus confiscate and destroy the business of filling prescriptions of medicine, and that it further erred in holding that prescriptions of in-

toxicating liquor for medical purposes could be prohibited, and that the use of alcoholic liquor as a curative agency could be forbidden.

In the District Court of Appeal it was argued by petitioner (plaintiff in error here) that the combined effect of the enforcement statutes of the United States and the local ordinance of Los Angles made it unlawful to prescribe more than eight ounces of intoxicating liquor once in ten days. In support of this, the pertinent provisions of the National Prohibition Act, and the supplement thereto, enacted by Congress in November, 1921, were set forth and explained.

The drastic provisions of the National Prohibition Act by which not only is the quantity of liquor regulated, but the number of actual prescriptions which may be issued is strictly limited, combined with the ordinance here in question, effectively prohibited the prescription of more than eight ounces of any form of liquor once in ten days. Certain forms of prescription blanks are required to be obtained for use in prescribing alcoholic liquor, under the act supplemental to the National Prohibition Act. The city ordinance imposed the restriction of eight ounces upon all alcoholic liquor, whether spirituous or fermented, thus only eight ounces of wine could be prescribed. Under the Volstead law no prescription may be filled more than

once, and a particular form was required which was likewise true under the city ordinance.

Therefore, without going further into petitioner's argument in the District Court of Appeal, we may conclude that the court was satisfied that the argument was sound, in view of the court's assumption of that fact in its opinion, *and the error of the court to which exception is here taken, is that it held that prescriptions of alcoholic liquor for medical purposes may be prohibited.*

At the hearing upon the presentation of the argument in the District Court of Appeal, the court expressed its desire to hear evidence upon the question of the essential character of intoxicating liquor as a medicine and what quantity should be prescribed in order that its use might be effective and benignant. At a later date, five medical practitioners were sworn and examined, among them being three of the leading and most conspicuous practitioners in the community.

To emphasize the trend of this testimony, we may take the following from the opinion of the District Court of Appeal:

> "At a hearing had before this court on the return made to our writ of habeas cor-

pus, six physicians were examined as expert witnesses for the purpose of enabling us to determine the medicinal value of alcoholic liquors. *All of them agreed that such liquors do possess some medicinal value.* Some of the physicians testified that there are certain substitutes for alcoholic liquor which makes the use of such liquor unnecessary and even undesirable. Others testified that in their opinion there is no substitute which can effectively take the place of alcoholic stimulants in certain cases, as in pneumonia, for example. Of these latter witnesses two or three testified that not even a pint of whiskey in ten days (the maximum amount permitted by the Volstead act) would be sufficient in some cases."

Thus, it will be observed that it was unanimous among these physicians that alcoholic liquors do possess medicinal value.

The witnesses, testifying in behalf of the petitioner, also stated that the restriction placed upon the prescription of such liquor by the local city ordinance was such as to render such prescription valueless, and from this petitioner argued that such a regulation amounted to a prohibition and that the prescription of alcoholic liquors for medical purposes could not be prohibited constitutionally.

The California court then brushed aside all questions arising from the debate over the ef-

fect of the ordinance and stated that it would assume that a prohibition of the prescription of liquors had been constituted of these combined provisions, *but that the city possessed the power entirely to prohibit the sale of alcoholic liquor as a medicine.*

Medical Prescriptions.

It will be conceded, of course, that the Eighteenth Amendment prohibits the sale, etc., of alcoholic liquor only for beverage purposes. The insertion of the phrase "beverage purposes" is a direct and unmistakable limitation upon the scope of the amendment. Therefore, any regulation imposed upon the traffic in alcoholic liquor for other than beverage purposes may be imposed only for the purpose of making complete and effective the enforcement of appropriate laws carrying out the primary design of the amendment. The use of intoxicating liquor for medicinal, mechanical, experimental or sacramental purposes is not forbidden, and the constitutional immunities found in the Fourteenth Amendment still embrace the right to engage in a lawful occupation, notwithstanding the use of alcoholic liquor may be an incident thereto, and to pursue such occupation in a manner necessary to its usefulness.

The fundamental distinction, heretofore explained, between the facts in the case of Purity

Extract Co. v. Lynch *(supra)* and the instant case, is that in the Purity Extract case the court was dealing with the prohibition of another beverage and not with the prohibition of the sale of intoxicating liquor for medicinal, mechanical or sacramental purposes. The "innocuous" substance, prohibited by the Mississippi law, had no particular value, and its character was described as that of a beverage. The spirit of the Eighteenth Amendment, then, should be taken to include the prohibition of such a substance, even though "innocuous", if its sale and distribution could be made a subterfuge for the sale and distribution of intoxicating beverages of similar kind and quality. Undoubtedly the police power of the state of Mississippi extended to such a measure, but as the Eighteenth Amendment affects beverages only, the regulation of intoxicating liquor for medicinal purposes is not within its scope, except in so far as such regulation may be necessary to the consummation of the major purpose of the amendment, namely, to make unlawful the traffic in intoxicating beverages.

That the police power of the states does not extend to the prohibition of medical prescriptions of intoxicating liquors has been several times decided in various forums.

For illustration, the District Court of Appeal of the State of California, in the Third Appellate District (the writ of error is in this instance directed to the Second Appellate District), in the case of the Town of Selma v. Brewer (9 Cal. App. 70), discussed the subject matter at some length, and the following excerpt is taken from the opinion in that case:

> "We are familiar with no principle of law from which authority may be deduced for prohibiting a pharmacist or druggist, regularly engaged in the business of compounding prescriptions and selling drugs, from having and possessing and selling intoxicating liquors for the legitimate purposes of his business, and from storing or keeping in stock such quantities of the same as the exigencies of his trade may require. It is, we think, a matter of common knowledge, as much so as are the uses to which quinine is medicinally put, that many, if not all, of the liquors mentioned in this ordinance are often deemed to be necessary to be used for medicinal purposes. Of course, as in the case of certain poisons ordinarily sold at drug stores, the sale of liquors for medicinal purposes by pharmacists or druggists may be, by the public authorities confined to such purposes and otherwise subjected to proper and reasonable regulation, or to the imposition of such conditions and restrictions as will safeguard, protect and preserve the rights of the public. It is well known that the

fundamental property of nearly all bitters, a legitimate subject of traffic by all druggists, is alcohol, and that the excessive use of them by an individual will produce intoxication. And there is no doubt that many prescriptions contain as an essential element, according to the judgment of physicians, some character of intoxicating liquors, and no doubt there are cases of physical illness which require liquor of some kind in its unmixed and unadulterated form. The medical doctor's prescription for *spiritus frumenti* (whiskey) or *aqua vitae* (brandy), when given for a legitimate medicinal purpose, is not uncommon, and certainly cannot be unlawful *per se*. And surely it could make no difference whether the whiskey or the brandy were dispensed by the pharmacist and used by the purchaser, in Latin or in plain English, if the purpose of such sale and use were purely medicinal. The sale of opiates and other more drastic poisons, by regularly licensed druggists is hedged about by restrictions which, as a protection to the public, the law has unchallengeable right to impose, *but it has never been supposed for an instant that the sale of such 'drugs' could be entirely prevented, any more than that the sale of the thousands of different kinds of specific and patent medicines and nostrums could be stopped, where it could be established that even when used for the particular medicinal purposes which it is claimed and advertised they will subserve, they would produce positive harm to such as might so use them.* (Italics ours.)

> "The legislature may and does (Penal Code Sec. 307) prohibit the sale of opium for certain designated purposes and under certain indicated circumstances, but it would not be contended that narcotics may not be kept and sold by a druggist as one of the essential elements of his business, for it is, as we know, as a matter of common knowledge, a substance necessary to be used in the compounding by a pharmacist of medicines and prescriptions. So as to liquors. It is known, as before observed, that they are frequently found necessary to be used in the compounding of physicians' prescriptions, and often found absolutely necessary in cases where the particular disease to be treated peculiarly affects the heart action. Liquors, therefore, when kept for medicinal purposes, come as clearly within the generic term 'drugs' as any other animal, vegetable, or mineral substance comprising the elements of which medicines and prescriptions are ordinarily compounded."

Plaintiff in error is impressed with the reasoning of Judge Knox expressed in the opinion written by him in the case of Lambert v. Yellowley (291 Fed. 640), wherein it is said:

> "The Eighteenth Amendment to the Constitution was designed to bring about the prohibition of intoxicating liquor 'for beverage purposes', and was not, I think intended to put an end to the use of liquor for purposes regarded by those who proposed the amendment, and by many of the

states that ratified it, as justifiable and proper. This view was, in part, at least, intended by Congress in enacting the Volstead law, which permits the sale and use of sacramental wines; the use in *bona fide* hospitals or sanitariums, of such quantity of liquor as may properly be administered under the direction of duly qualified physicians employed therein to a person suffering from alcoholism; and the use of industrial alcohol under certain restrictions in arts and sciences."

And again:

"If, as the complaint alleges, the administration to a patient of more than the statutory quantity of liquor is *necessary* for his relief from a certain known ailment, the inability of such patient to have his legitimate needs supplied means that he is subjected to a prohibition that certainly is not within the terms of the Eighteenth Amendment, and which easily may be imagined, might subject him to serious consequences, if not death itself. While the exercise of regulatory power in the interest of the public at large frequently brings about individual hardship, it is to be recalled that one of its chief objects is to preserve health—and is not to jeopardize and destroy it. For this reason, I feel that persons are not to be deprived of the use, when required, of such medicines as are proper and necessary for their relief, unless authority for such deprivation has expressly been conferred."

Judge Knox also referred to the controversial character of the use of intoxicating liquor

as a medicine and to the fact that 51% of 30,000 physicians, answering a questionnaire, had been registered in favor of the use of such liquor for legitimate medical purposes.

In a supplement to this brief will be found a resolution adopted at a session of the American Medical Association, June 3, 1922.

Judge Knox further stated that much support was to be found in the contention that there was a proper and desirable policy in many states, where prohibition had been recognized for many years, looking to the preservation of the right of the public to resort to the medicinal use of intoxicating liquors in the treatment of known ailments, and drew the conclusion therefrom that the limitations of the Volstead law and the supplementary act, making it unlawful to prescribe but one pint of intoxicating liquor for the medicinal use of a person whose known ailment requires the administration of a greater quantity, are void.

Judge George M. Bourquin, of the United States District Court, for the District of Montana, rendered an opinion in connection with his decision in the case of United States v. Freund, on July 6, 1923 (290 Fed. 411), holding that certain of the provisions of the National Prohibition Act, governing the prescriptions of intoxicating liquor by physicians, were invalid and unconstitutional.

The subject matter was carefully reviewed by Judge Bourquin and too great emphasis cannot be given to the care and thought evidenced in his opinion, as well as the trenchant and incisive phrasing of the same.

In discussing the subject, Judge Bourquin said that the courts are not concerned with the wisdom or necessity of laws; that if unwise laws are enacted, the remedy is by appeal to Congress to change them; otherwise, he said, the judgment of Congress would be subject to review by the courts, which is not contemplated in our system of government. But, on the other hand, it was said, that laws that infringe constitutional provisions are laws in name only, and are ineffective, unenforcible and it is of concern and the power and duty of the courts so to determine, adjudge and declare. We are herewith setting forth certain of the discussion of the learned judge, in view of the appropriate character of his statements to the situation we are confronted with in this case.

Asserting that the limitations upon the number of prescriptions to be used by a physician and the amount of the dosage of alcohol to which he is confined, were void, he said:

> "In so far as the statutory provisions involved affect the property right of physi-

cians to practice their necessary calling, and encroach upon the state's police power of regulation, they are in exercise of federal power, to which property rights and police power always yield. Therein Congress has not undertaken to forbid the use of alcohol as a therapeutic agent, but, even as all legislation brought to the attention of or known to the court, it recognizes the extensive use, if not value, of alcohol in medical practice, the faith of a large part of profession and people therein, and it sanctions its continued use, whether or not it could have prohibited it. This, however, is coupled with regulations and restrictions which in part, it is believed, are arbitrary and unreasonable interferences with the lawful property and personal right of physicians to prescribe alcohol for remedial purposes, and of ailing people to receive it.

"They purport to limit a physician to 100 prescriptions for use in any period of 90 days, save for some 'extraordinary reason.' This is nothing but an arbitrary restriction upon the number of patients a physician shall treat in ordinary course of circumstances, or is an unreasonable mandate to malpractice in respect to them, and is invalid.

"So, too, they purport to determine the dosage of alcohol a physician may prescribe, and from him any patient shall receive, viz., not to exceed one-half pint for use within any period of 10 days. If therapeutics were an exact science, if diseases and their courses were of determined diagnosis and invariable prognosis, if patients were constituted alike and affected alike, if remedies could be admeasured by fixed rule, this provision would be valid. But since in

respect to all these factors the truth is otherwise, every patient presenting to the physician a different problem for solution, this provision of the statute is invalid.

"It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice. It may be that, even as legislation for reasons of health can compel vaccination, it might in like behalf extend prohibition to alcohol for therapeutical uses. But, so long as legislation tolerates or sanctions such uses of alcohol, the duty and judgment of the physician, the necessity and welfare of the patient, and the right of both, cannot be subjected to arbitrary and unreasonable legislative interference, dictation and infringement, like the statutory provision last aforesaid.

"The physician, with power to begin a course of treatment, must have like power to finish it. His judgment to begin must be unrestricted to conduct and finish. Otherwise may be dangers greater than involved by denial of any power, for the latter might be compensated by substitutes. These statutory provisions to restrain the judgment of physicians in exercise of power to prescribe alcohol deprive physicians and patients of liberty without due process of law and within the meaning of the Fifth Amendment, and are unconstitutional."

Authorities on Medicinal Liquor. Medicine May Not Be Prohibited.

Following are expressions taken from various authorities upon the subject of prescribing alcoholic liquor as a medicine:

Commonwealth v. Fowler, 96 Ky. 166, 28 S. W. 786.

The appellee Fowler was indicted for selling whiskey without a license, and upon an agreed statement of facts defendant was found not guilty. The matter was reviewed in the Court of Appeals of Kentucky, and from the opinion written by that court the following excerpt is taken:

> "Everyone has the right to follow an innocent calling without permission from the government. He may do with his own whatsoever he pleases, so that he injure no one else. We agree with learned counsel that 'the doctrine of legislative permission, as a condition precedent to the conduct of any useful or harmless business, is grossly repugnant to those obvious principles of human right which lie at the foundation of just government among men.' So, then, without governmental interference or consent, the farmer may till his soil, the merchant may buy and sell, the lawyer and the doctor practice their professions, and the druggist and pharmacist compound their medicines. And if, by reason of shysters and quacks, an injured people demand protection, or if, because ill-behaved

druggists or pretended pharmacists debauch the public morals by dealing out intoxicating liquors and nostrums as beverages, yet the pursuit of these callings cannot be prohibited. The innocent and honest druggist cannot be restrained of his liberty by reason of the dishonest practices of others. His pursuit, being in itself harmless, and indeed useful, and capable of being conducted without harm to the public, cannot be prohibited, and this is true of every legitimate act going to make up and constitute his trade or profession. It is as true of his right to fill a prescription for whiskey as a medicine as it is of his right to fill one calling for calomel. As said by this court in Sarrls v. Com., 83 Ky. 332, 'The power of the legislature to prohibit the prescription and sale of liquors to be used as medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of their sale and use for religious purposes.'"

Bowman v. State, 40 S. W. 796.

The court of criminal appeals of Texas had before it a question involving the right of the Legislature of that state to except from a statute, enacted under a special constitutional provision, and prohibiting the sale of intoxicating liquor, sales of such liquor for sacramental and medicinal purposes. Again emphasizing the firmly established position of all authorities, courts and legislatures, that the sales of intoxicating liquors, which may be used for beverage

purposes, are nevertheless appropriately permitted for medicinal purposes, the court said:

> "It was further known at the time that alcohol, in various forms, was in common use among the people in case of sickness for medicinal purposes; *alcohol, in various forms, entering into combination with many of the most useful medicines belonging to the profession. These were not evils to be provided against, but privileges to be conserved;* and it is not inimical to a proper construction of the provisions of the constitution in question to interpret it in the light of the surrounding circumstances under which it was adopted. In making it a part of the fundamental law, the people sought to circumscribe the liquor traffic, and to place it within the power of communities to adopt laws for this purpose; and it is in keeping with the spirit of this enactment to authorize communities to abolish the sale of intoxicants for all purposes except those deemed essential to the health and moral well-being of society. This is not a question of *ultra vires* (that is, that the legislature has exercised more authority than that conferred upon it by the constitution), but the contention is that they have exercised less. In our judgment, the greater includes the less; and in this instance the law is not rendered void, as being unconstitutional, because the legislature may have seen fit to ingraft on the law, after it has been adopted by the communities, the exceptions enumerated."

Ex Parte Cowert, 9 So. (Ala.) 225.

In this case the petitioner was convicted of a violation of an ordinance which provided that it should be unlawful for any person to sell spirituous, vinous or malt liquors in any quantities within the corporate limits of the town of Union Springs. The following is taken from the opinion of the Supreme Court of Alabama:

> "The statute in question, it is insisted, does not confer power on the town authorities to prohibit druggists to sell such liquors for medicinal purposes, and hence it is argued that the ordinance is void, in that its terms are sufficiently broad to embrace and interdict such sales by this class of persons. We need not decide whether the town, under this law, assuming the statute itself to be valid, had the right to prohibit sales by druggists. It may be admitted, for all the purposes of this case, that the corporate authorities were without power to prohibit, as they were clearly without power to require a license tax from druggists in respect of sales for the purposes and under the circumstances designated, and that the ordinance was invalid as to that class of persons and certain sales made by them."

McNulty v. Toopf, 116 Ky. 202, 75 S. W. 58.

The above entitled case was an appeal from a judgment in favor of the defendants. The proceedings involved the validity of an ordin-

ance of the city of Paducah, in which it was provided that it should be unlawful for any druggist, groceryman, wholesale liquor dealer, or other person, to dispense, sell or give away any spirituous, vinous or malt liquors between the hours of 10:30 o'clock p. m. and 5 o'clock a. m.

The excerpt below is taken from the opinion of the Court of Appeals of Kentucky:

> "Concerning the inhibition of a druggist dispensing spirituous, vinous or malt liquors between the hours of 10:30 p. m. and 5 o'clock a. m., we are of opinion that the ordinance is invalid. The druggist is not permitted to dispense or sell spirituous, vinous, or malt liquors at any time by the drink or as a beverage. It must be disposed of only as a medicine, and generally by the prescription. It may be important, and, indeed, necessary that this right of the druggist to lawfully dispose of this ware at any time of the day or night should be unrestricted by such interference."

Sarrls v. Commonwealth, 83 Ky. 327.

The defendant was accused of having unlawfully sold alcoholic liquor without a license within the corporate limits of the town of Newcastle. Section 3 of the law under which the conviction was had provided regulations covering the use of such liquors by physicians in their profession.

"The social order, health and security of a local community may, in the opinion of the Legislature, require that the selling or giving of spirituous, malt or vinous liquors, to be used as a beverage, be prohibited, as to which, as well as any other subject affecting the health or morals of a community, that department of the government has the power to determine; and it is not inconsistent with that object to authorize the sale of liquors as medicine when necessary for that purpose; on the contrary, while the Legislature has the power to regulate the sale of liquors to be used as a beverage, or to prohibit its sale for that purpose altogether, it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as medicine. * * *"

"If the Legislature has the power at all to prohibit the sale of intoxicating liquors by retail, it exists alone because the health, peace and order of society require it; and upon that ground alone this court, without dissent, has heretofore decided it may be exercised; but there being no reason therefor, the power of the Legislature to prohibit the prescription and sale of liquors to be used as medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale and use for religious purposes."

State v. Wray, 72 N. C. 253 (Official Volume, p. 240.)

In the above entitled case it was held that a druggist, who in good faith sells spirituous liquors as medicine by directions of a physician,

was not indictable under a statute prohibiting the sale of spirituous liquors without exception. The court said, in the course of its opinion, that the letter of the law had been broken, but implied that the spirit of the law was not violated. Further:

> "Perhaps it will give us a clearer view of the case if we put the druggist out of the question and suppose that the physician himself, in the exercise of his professional skill and judgment, had furnished the liquor in good faith as a medicine. Can it be pretended that he would be any more guilty of a violation of our statute than the surgeon was guilty of a violation of the Bolognian law? We think not.
>
> "But we would not have it understood that physicians and druggists are to be protected in an abuse of the privilege. They are not only prohibited from selling liquor in the ordinary course of business, but also from administering it as a medicine, unless it be done in good faith, and after the exercise of due caution as to its necessity as a medicine."

State v. Larrimore, 19 Mo. 391.

The defendant was indicted for selling brandy without a license. His defense was that he was a practicing physician, and had sold the liquor as a medicine.

The court, in its discussion of the case, said:

> "If the physician, upon his professional judgment that a sick person needs brandy,

> administers it as a medicine, in good faith, and charges for it, he is not to be punished; because such medicine, properly used, is a valuable medicine. But if he sells it to a man who is well, or sells it to a man who is not well, without exercising his professional judgment, and determining that it is necessary for the sick person, he is indictable. His exemption from the fine is not to rest upon the strong wish of the individual purchasing to have the liquor, nor merely upon the judgment of such person that the liquor would be useful to him as a medicine, but must be founded upon the judgment of the physician that it is a medicine which the diseased man requires."

In Nixon v. State, 76 Ind. 524, the Supreme Court of that state held that the act of a druggist in selling intoxicating liquor for a medicinal purpose was not within the scope of the law under which the conviction of the defendant was had, notwithstanding the fact that the statute contained no exception authorizing the sale of such liquor for medicinal purposes. Apparently all the court felt that was necessary to exempt a druggist from the operation of the law was that the sale should be made in good faith for such excepted purpose.

The court, discussing the matter, said:

> "Upon the foregoing evidence, we are of the opinion that the appellant was not guilty of an unlawful sale of intoxicating liquor, as charged in the indictment; and

that the court, therefore, erred in overruling his motion for a new trial. It is true that the statute, under which the appellant was indicted, contains no exceptions authorizing the sales of intoxicating liquors, without license, for medicinal, chemical or sacramental purposes. But it has always been held by this court, in construing similar statutes, that the courts will except, from the prohibitory or penal provisions of the statute, all *bona fide* sales of such liquors for such purposes."

The same principle had, prior to the Nixon case, been asserted in opinions rendered in the following cases:

Donnell v. The State, 2 Ind. 658;
Thomasson v. The State, 15 Ind. 449;
Jakes v. The State, 42 Ind. 473;
Ball v. The State, 50 Ind. 595;
Hooper v. The State, 56 Ind. 153.

The following discussion of the subject matter appears in sections 222 and 223, of Freund on Police Power:

"All prohibitory laws make an exception in favor of sales for medical purposes. *This is not a legislative indulgence but a constitutional necessity, since the state could not validly prohibit the use of valuable curative agencies on account of a remote possibility of abuse. 'The power of the legislature to prohibit the prescription and sale of liquor to be used as medicine*

*does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale for religious purposes.' * * *"*

"The right to an adequate supply of medicines cannot be cut off by the legislature, and when legal provisions would have such effect they must to that extent be inoperative. The plea of necessity should be accepted as a sufficient defense to a criminal charge under such circumstances. Courts have repeatedly intimated that statutory prohibitions must not be pressed to extreme and unreasonable applications within the letter, but not within the spirit of the statute. This view was taken in North Carolina and Mississippi, even without proof that the necessity could not have been provided for without a violation of the letter of the law."

Tiedeman, in his work on State and Federal Control of Persons and Property (1900 Ed.), said:

"The law can prohibit the keeping of houses where those who are addicted to the opium habit are entertained with the opium pipe; the law may subject the sale of opium to such regulations as may be calculated to diminish the temptation to acquire this evil habit; *but the sale of the drug for proper purposes cannot be prohibited. It is possible that the sale of opium or other poisonous drugs may be prohibited to all except those who, like physicians and druggists, furnish in their professional character a safe guaranty, that no improper use shall be made of them, and to others upon*

the prescription of a physician. But that is questionable. The sale of it can, of course, be prohibited to minors and to all who may be suffering from some form of dementia, and to confirmed opium eaters. But it would seem to be taking away the free will of those, who are under the law confessedly capable of taking care of themselves, if the law were to prohibit the sale of opium to adults in general.

Where a thing may be put to a wrongful and injurious use, and yet may serve in some other way a useful purpose, the law may prohibit the sale of such things, in any case where the vendor represents them as fit for a use that is injurious, or merely knows that the purchaser expects to apply them to the injurious purpose."

Cases Distinguished.

Thus it is established, from the authorities furnished above, that the courts of many jurisdictions have given approval to the general doctrine that the right to prescribe medicine, either of intoxicating liquors or of other ingredients, is a constitutional right, of which a physician may not be deprived. The District Court of Appeal, however, in its decision discharging the writ of habeas corpus in the case at bar, called attention to two notable decisions in the states of Kansas and Tenneseee:

State vs. Durein, 70 Kan. 1; and
Motlow v. The State, 125 Tenn. 547.

The court referred to the language of the Kansas court in the case of State v. Durein and quoted at length therefrom, but as an enunciation of principles in any way militating against the argument of the plaintiff in error, we cannot discern its applicability. The defendant Durein was found in charge of a beer saloon, in which, at the time, there were several men sitting at tables and drinking beer. Upon a raid by the county sheriff, the place was found to contain a bar and all the equipment of a saloon, and miscellaneous receptacles filled with intoxicating liquor. The defendant was found guilty of the unlawful sale of intoxicating liquor. Upon the appeal it was argued that the defendant might have been a registered pharmacist, and that there was no allegation to the contrary in the information filed against him. The court held that no such allegation was necessary. It then proceeded to state that the statute recognized no independent right in a druggist's clerk to make sales of intoxicating liquors. There was no question involving the right of a physician to prescribe liquor, and apparently this decision only adjudicated the fact that there appeared no necessity for a negativing allegation in the information. *During the course of the argument, however, that portion of the opinion which was quoted by the*

California court does appear in the language quoted, but it will be observed that the effect of the decision is not to hold that a physician may not prescribe intoxicating liquor. Indeed, the state constitution of Kansas expressly excepts the sale of liquor for medical, scientific and mechanical purposes from the prohibition which therein appears. The discussion of the right of the state to prohibit the use of liquor for medical, scientific and mechanical purposes is solely *obiter dictum.* The court was not called upon to determine whether the sale of intoxicating liquor for these independent purposes could be prohibited, and the questions involving the constitutionality of the statute which were discussed were not appropriate to the defense interposed by the defendant. As we have stated before, the evidence disclosed that the defendant was maintaining a place for the sale of intoxicating liquor, and that every indication pointed conclusively to the fact that it was a common tippling resort. Possibly the court might have felt that it was called upon to decide whether the medicinal use of intoxicating liquor was or was not guaranteed by the constitution, but the facts upon which the conviction was based did not justify any reversal due to a construction of the constitutional rights of a physician to prescribe, or a druggist to sell, medicine.

And we find a similar effort on the part of the Tennessee court, in Motlow v. the State, *supra,* to decide something which was not before it. The court expressly declared that it was lawful within the state to sell alcoholic liquor for medical and other non-beverage purposes, but proceeded to decide that nevertheless, the legislature could constitutionally inhibit such sale, if, in the legislative wisdom, it was found expedient, and, in fact, what seems to have been decided in this case was that even though such liquors might be sold within the state for such non-beverage purposes, yet the state could prohibit the manufacture thereof within its boundaries.

At a later point in the opinion in the Motlow case, the Tennessee court again calls attention to its issue with the opinion of text writers, particularly that of Mr. Tiedeman, that the sale of alcoholic liquor for non-beverage purposes could not be prohibited, and continuing in this line the Tennessee court expressed its view that the case of Powell v. Pennsylvania, 127 U. S. 678, was determinative of a contrary conclusion. This court in the case of Powell v. Pennsylvania, decided that the sale of oleomargarine might be prohibited in the interest of the enforcement of a statute of Pennsylvania intended to prevent deception in the sale of that product.

Again we have a fallacious analogy. It is conceivable that oleomargarine may have a useful purpose, but its sale and distribution are not essential to the welfare of a community, as is the practice of medicine or the prescription of medical compounds.

For the reasons outlined at length, we contend that the Durein case and the Motlow case are not determinative of the main question involved in this litigation, and submit that the doctrine therein enunciated is not a true expression of the scope of the organic law.

That the California court, to which this writ of error is directed, was not united in its views upon the general subject of the right to prescribe intoxicating liquor, is evident from the language of Judge Works, who, though he wrote a concurring opinion, made certain definite and illuminating remarks upon the right of persons to select their own schools of medicine and to be treated in the manner deemed to be most efficacious by those schools.

Concurring Opinion of Judge Works.

Judge Works said:

"If any proposition of law is well settled, in most jurisdictions, at least, it is that every person has the constitutional right to resort to such established and legalized school or system

of healing as he pleases for relief from his ailments. When men differ in opinion merely as to the efficiency of different schools or systems, it is not a proper subject of legislation to attempt to control or limit the right of any to act pursuant to his opinions or beliefs by resorting to the school or system of his choice (*Eastman v. State*, 109 Ind. 278, 10 N. E. 97; *State v. Liffring*, 61 O. St. 39, 55 N. E. 168; *State v. Biggs*, 133 N. Car. 729, 46 S. C. 401; *State v. Smith*, 25 Ida. 541, 138 Pac. 1107; Bishop on Stat. Crimes, Sec. 998a; Freund, Police Power, Sec. 16. As having a general bearing upon the question, see, also, *State v. Gravett*, 65 O. St. 289, 62 N. E. 325; *Louisiana State Board v. Carpentier*, 140 La. 405, 73 Sou. 248; *American School v. McAnnulty*, 187 U. S. 94). This principle has found frequent expression, not only in the cases cited, but in others, at the suit of the homeopath, the eclectic, the osteopath, the chiropractor and the Christian scientist.

A necessary corollary to the proposition just stated, so it seems to me, is that one may not be deprived, constitutionally, of his right to have alcoholic beverages prescribed for him as a medicine. If one may resort, without fear of legislative interference, to the duly qualified practitioners under the system in which that one believes, it must be true that he is also entitled, without fear of such interference, to use the medicines which his practitioner prescribes, as well as to submit himself to the rubbings or massage, or insist upon the benefit of the prayers which are a part of the practitioner's system. Of what value is the patient's right to resort to the practitioner if he may be denied the services of the latter after he is called? Of what value is that right if the patient may be denied the medicines which the practitioner pre-

scribes for his relief, whether alcohol or hot water? It appears to me, at least so far as the expressions of the majority opinion to the contrary are concerned, that a patient must have the constitutional right to resort, without stint or limitation, except as imposed by the practitioner in his prescriptions, to the medicine in which the school of the honest and qualified physician believes.

I am, therefore, impelled to the view that certain authorities which the majority opinion discredits are closer to the instant case than are those which it follows. The authorities which I have in mind are the ones to the effect that the legislative department may not prohibit the prescription and sale of intoxicating liquor as a medicine (see *Saarls v. Commonwealth,* 83 Ky. 327; *Commonwealth v. Fowler,* 96 Ky. 166, 28 S. W. 786; *McNulty v. Toof,* 116 Ky. 202, 75 S. W. 258; *Ex parte Cowert,* 92 Ala. 94, 9 Sou. 225; *Town of Selma v. Brewer,* 9 Cal. App. 70; Freund, Police Power, Secs. 222, 223; Tiedeman, State and Federal Control of Persons and property, Sec. 112). *It is clear to me that, if these authorities state the law, it logically follows that the amount to be sold cannot be limited by legislation. If it be conceded that the physician may prescribe and the patient use a certain drug, it must be true that the physician must be allowed a free and untrammeled judgment to determine the quantity to be prescribed and used.* If he may not exercise that judgment the patient is deprived of his services, for if in the opinion of the physician a given quantity of any drug is necessary to a healing, for him to be forced to prescribe less were as if he were forbidden to prescribe at all.

III.

The Effect of Judicial Sanction of a Law Forbidding the Prescription of Medicine.

A very large proportion of the *materia medica*, if not substantially the whole, consists of drugs, solutions and compounds which are harmful, and the use of which may be fatal, if not restricted and controlled. Furthermore, a very large group of preparations such as the derivatives of coca leaves, opium and other sedative drugs have habit forming qualities which are universally known to be insidious and dangerous to all persons having even casual contact with the same.

Yet Congress has not seen fit to say how much of an opiate a physician may prescribe, providing he prescribes in good faith.

(See Harrison Act, 38 Stat. 785.)

The various statutes of the states regulating the narcotic abuse have similar provisions, by which no definite restriction is placed upon such prescriptions, except that, generally speaking, they may not be given to addicts for any purpose other than to cure the addiction.

Thus, we find present in laws and regulations a widespread recognition of the necessity of medical science in the alleviation of ills, and we have come to recognize such science as an in-

dispensible factor of usefulness, established by long years of growth and development.

Referring again to the authority upon which Mr. Justice Finlayson, in the California District Court of Appeal, rested his decision in the case at bar, that is to say, the authority of Purity Extract Co. v. Lynch, *supra*, it is urged that there is no analogy. The suppression of the "innocuous beverage" described in the Purity Extract case, cannot be compared in its effect upon the public weal, with the restriction or suppression of the exercise of an honorable professional calling, such as the profession of medicine.

If this, or any, court is to give its sanction to a city ordinance which goes so far as to say that a therapeutical agent, such as whiskey, cannot be used in any quantity, or may be so restricted as to render its prescription and use valueless, then the same tribunal must impress the seal of its approval upon any law prohibiting the sale or use by physicians of narcotics, mineral poisons, anasthetics, sedatives, and all tonics, stimulants, or compounds having any alcoholic content, without reference to how much medication there may be in the same, to prevent their use as a beverage. Every drug may be misused, every prescription may result in damage to its user, all drugs and medicines

may be taken in unnecessary quantities by hypochondriacs, or may be used to create simulation of illness in malingerers, yet to interfere or overrule the *bona fide* use of a physician's discretion is to defeat the proper purpose of his calling and terminate its usefulness.

Indeed, this court has expressed its own approval of the use of intoxicating liquors in medical compounds. It was Mr. Justice Field, writing the opinion of this court, who said that the degree of care and scrutiny which should attend the pursuit of a business or occupation will necessarily depend upon the safety and freedom from injurious or dangerous conditions, attending the prosecution of the same, and continuing the learned justice said:

> "In the preparation of medical compounds, *intoxicating liquors and even still more dangerous ingredients are often properly used;* but the protecting care of the government, municipal or state, in their use, should never be relaxed beyond the bounds of absolute safety."

Gray v. Connecticut, 159 U. S. 74.

Taking the above quotation from the foregoing decision, and having in mind that this court did in its opinion in that case sustain the validity and constitutionality of a law requiring pharmacists to obtain certain authority from the state of Connecticut before using intoxicating

liquors, and having further in mind that this court in that decision held that such a regulation was not in violation of the Fourteenth Amendment, it will be discerned, by contrast, that in the expression italicized in the quotation above, this court stated its conviction that intoxicating liquors may be properly used in the preparation of medical compounds, as are "still more dangerous ingredients."

That particular professions, occupations and businesses, having some value in the welfare of the community, and finding their origin in the necessities of human kind, may not be arbitrarily prohibited, nor restricted in such form as to work a prohibition, has been again established by the force of the decision of this court in Adams v. Tanner, 244 U. S. 590. In the opinion in this case, the court stressed the possibility of reprehensible practices creeping into all businesses and trades, but nevertheless it said:

> "Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation for any one of them by the public. *Happily for all, the fundamental guarantees of the Constitution cannot be*

freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Congress itself has recognized the right of physicians to prescribe intoxicating liquor for medicinal purposes, and the city council of the city of Los Angeles, in causing section 5 of Ordinance Number 37,699 (New Series) to be included within its provisions, recognized that there were certain logical exceptions to the prohibition of the ordinance.

Judge Knox, in his opinion in the case of Lambert v. Yellowley (291 Fed. 640), directs attention to this recognition by Congress of the necessity of exempting the prescription of liquor for medical purposes, and in fact in all of the various states we find such exceptions included in all permissive and prohibitory laws and ordinances touching the subject of alcoholic liquor.

The Eighteenth Amendment likewise contemplates that intoxicating liquor may be properly used for purposes other than beverage purposes, and, as asserted, there is written into all legislative mandates upon the same subject matter some form of exception permitting the use of liquor for medical purposes. Even the constitutions and laws of the so-called "bone-dry" states, antedating the Eighteenth Amendment, included such provisions, and, in fact, there is

yet to be pointed out a single legislative enactment which has had the effect of completely prohibiting the sale of alcohol and the various products including it as an ingredient for such exceptional purposes as those contemplated by the provisions of section 5 of the ordinance, the validity of which is here disputed.

Not only is the practice of medicine recognized as a lawful and proper vocation, the members of which are required to demonstrate a high degree of skill and fitness before they may engage in practice, but the vocation of a pharmacist has also come to be regarded as a respected professional activity. All the reasons which are present in the regulation of the practice of medicine, the practice of dentistry and other professional callings, apply to the regulation of the practice of pharmacy, and it has been established that the police power of the state includes the right to regulate the practice for the purpose of insuring a proper degree of education and a sufficient standard of fitness on the part of the licentiate.

State v. Kumpfert, 115 La. 950;
Minnesota State Pharmaceutical Assn. v. The State Board, 103 Minn. 21;
Gray v. Connecticut, 159 U. S. 74.

Therefore, in the prescription and sale of intoxicating liquor for medical purposes, the pub-

lic is protected by the regulations imposed upon the practice of both professions, the licentiates of which must act together in order that such a prescription be filled and used. The pharmacist is not permitted to sell the liquor without a prescription and the physician is not permitted to fill his own prescription (with certain exceptions in favor of hospital use, etc.) and, therefore, both of these professional practitioners must unite to authorize the sale of intoxicating liquor under these circumstances.

Physician and Pharmacist Both Under Control of State Board.

Furthermore, the practice of medicine is regulated in respect to the conduct of its practitioners. Unlawful and unprofessional conduct may be punished by the revocation of the practitioner's license. The pharmacist and physician have no vested right to continue their practice, but may do so only conditioned upon good behavior and compliance with the law. Disciplinary jurisdiction and power is lodged in all examining boards. It has been held that the habitual sale of intoxicating liquor contrary to law constitutes gross immorality within the meaning of a statute providing for the revocation of a pharmacist's license.

Indiana Board of Pharmacy v. Haag, 184 Ind. 333.

In addition to the restrictions, regulations and rules with which physicians and pharmacists must comply under the various state laws and ordinances controlling such subjects, there are now all of the drastic regulations imposed under the National Prohibition Act. Certain kinds of prescription blanks are required to be used. The quantity of liquor obtained by a druggist is carefully checked by a system of receipts, and the quantity which he dispenses and retails in sale upon prescriptions may be definitely ascertained and determined.

The possibility, therefore, of selling intoxicating liquor for beverage purposes, which is the only reason for which its sale may be regulated for medicinal purposes, is, under the National Prohibition Act, so completely controlled that the possibility of its abuse is remote and negligible.

If a drug store may become a resort for the unlimited sale of intoxicating liquor, if the registered pharmacist may so violate his professional standards as to sell such liquors unlawfully, then such possibility exists entirely independently of his right to sell it for medical purposes. Under the present stringent regulations employed by the prohibition enforcement officers, it is not possible to sell the liquor which a druggist obtains from bonded warehouses, un-

der the direction of the governmental functionaries, for beverage purposes, as there is too complete a check upon the quantity which he buys and the quantity which he dispenses, and therefore, if he will violate the law, he can do so independently of his right to dispense liquors lawfully upon prescription.

In other words, there is no more reason why a druggist should thus violate the law than there is that a restaurant owner or the proprietor of a lunch room shall do the same, because if any liquor is now to be sold illicitly, it must be procured illicitly, and it is as easy for any tradesman to procure intoxicating liquor through unlawful channels as it is for the druggist so to do.

It was well said by this court in the National Prohibition cases (253 U. S. 350), in its final conclusion, page 387, that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, and as the word "beverage" has a well-defined legal meaning, it follows that unduly to encroach upon the sale of liquor for purposes other than beverage purposes is to transcend the power of Congress to deal with this subject.

The question of what charter power the city of Los Angeles had to enact the particular or-

dinance is not a matter for this court's determination, except in so far as that power is based upon the police power of the state, and of course if the state had no such police power, it follows that one of its political subdivisions would not have such power.

Mr. Justice Holmes, when a member of the Supreme Court of the state of Massachusetts, defined the use of the word beverage in the following manner:

> "Sales of liquors to be used as a beverage were spoken of by way of antithesis to sales for medicinal purposes, and signified sales of liquor to be drunk for the pleasure of drinking, as distinguished from sales of liquor to be drunk in obedience to a doctor's advice."

Medical Liquor May Not Be Prohibited.

Therefore, it is indisputable that the people of the United States, in adopting the Eighteenth Amendment to the Constitution, did not have in contemplation anything more than the suppression of those wide-spread abuses due to the consumption of alcoholic liquor for pleasure, excitement or improper stimulus.

The purpose of this argument is not to defend the use of alcoholic liquor for beverage purposes, and no doubt the wisdom of the people, as it is given expression in the Eighteenth

Amendment, is unimpeachably sound and just. The amendment is intended to prohibit a traffic, which, according to statistics and experience, has contributed largely to the unfortunate mistakes of distorted minds operating under its influence, and has accelerated criminal careers. That the unregulated use of, and traffic in, high proof alcoholic liquors have increased poverty, distress, disease and crime is an assertion which may be warranted by statistical proof, but with this we take no issue here. Whatever indictment may be made of the use of such liquor, how much more appropriate and with how much greater force may the same accusation be directed against the use of opium, cocaine and kindred drugs and their derivatives!

Many forms of alcoholic liquor have been used in families with moderation and restraint precluding a deleterious effect, but the use of narcotics by persons whose physical condition requires no sedative is followed by mental and physical derangement and degeneration.

Yet, with what power of truth it has been declared that the use of narcotics, directed by skilled and experienced physicians, has softened the poignancy of anguish accompanying the disease of cancer and other malignant growths. And so the use of morphine and cocaine is indispensable in hospitals and sanitariums, and

the use of chloroform and ether is required in general anaesthesia; yet any of these drugs are of such a dangerous quality as to justify the most drastic regulation.

But can it be successfully advanced as an established principle that the sale of such drugs may be prohibited for therapeutical use? We think not.

Even the prescription of narcotics to addicts is expressly authorized by many statutes, in order that the weakness be remedied and the addiction be cured; that is to say, recognized medical authorities approve the giving of narcotics to persons suffering from the habit of their use, in decreasing doses, with the object of curing the habit.

There is every logical reason why the use of alcoholic liquor for medical purposes may be sustained as one of the constitutional uses to which property may be placed, without hindrance from governmental authority.

What has been said about the prescription of alcoholic liquor by physicians applies with equal force to their emergency use in operative cases in hospitals, as well as in the cure and alleviation of acute alcoholism and similar physical disturbances.

It is only in the light of this belief on the part of the writer of this brief that the use of

alcohol, in its various forms for medicinal purposes, is as much to be defended as is the use of medicines containing other ingredients, that this is written. Narcotics, poisons and deleterious substances may, without doubt, be regulated, and the sale thereof restricted, but hedged about by sensible regulation, they may not be prohibited as medicines.

Useful Business May Not Be Suppressed.

In the case of State v. Taft, 118 No. Carolina, 1190, the Supreme Court of that state had under consideration an ordinance making it unlawful for any person to sell any second-hand clothing or bed furniture within the town of Louisburg. This ordinance thus contained a prohibition of the sale of such articles within the township limits. It can be seen that the ordinance was directly based upon the preservation of the public health, and that it had some definite relation to the public health cannot be disputed. Undoubtedly any ordinance intended to prevent the spread of contagion or the communication of infection has a benign purpose, yet the Supreme Court of North Carolina took the obvious position that the sale of such clothing constituted lawful business, and that it might be regulated to that end, but that it could not be prohibited. It was said by that court:

"The question presented in this case for our consideration is whether the commissioners can, under the powers given them by law, in their discretion, absolutely prohibit a lawful business not in itself necessarily a nuisance, but which may be conducted without danger to the community, when properly regulated. The sale of second-hand clothing is not a nuisance, *per se,* but is on the other hand a lawful business, and under proper regulations may be so conducted as to be without danger to the health of the community, and at the same time to be of great benefit to a large portion of the people. There is nothing dangerous to health in articles of second-hand clothing of themselves; they can only become noxious by reason of prior use, of having been worn or possessed by persons themselves infected, or living in infected communities. The town authorities would have the right to compel fumigation and disinfection of second-hand clothing; they might require proper assurances, before such articles were imported or offered for sale, that they have not been bought in, or brought from, markets or places where epidemics of contagious or infectious diseases were or had been recently prevailing; or they might prohibit the further sale of such stocks from which articles had been sold and had communicated disease.

* * * * * * * *

We are of the opinion that the commissioners transcended their powers in the passing of this ordinance; that it is unreasonable in that it is prohibitory of a business lawful in itself, and that it is void."

And again, in the above case, the court, referring to the case of Greensboro v. Ehrenrich, 80 Ala. 579, called attention to the language of the Supreme Court of Alabama, which court had said:

> "Municipal authorities, having power to abate nuisances, cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health."

IV.

Constitutional Limitations Upon the Police Power.

One of the exceptions taken by the plaintiff in error to the position of the District Court of Appeal, expressed in its opinion, is that included within the ninth specification of errors, namely, that the state did not have a right to discriminate between the filling of prescriptions for alcoholic liquors and the filling of prescriptions for other drugs and curative agencies.

The writer recognizes that in the enforcement of its police power the state has a right to select a certain definite condition to be regulated or corrected, and to make its restrictions applicable to that particular subject of regulation, but there

is a limit to the discrimination which may be exercised by the state in applying police regulations.

In suppressing the sale of alcoholic liquor as a medicine, or in interfering with the discretion of a physician in the prescription of such a medicine, *the state is not then dealing with intoxicating liquors as such,* but is dealing with *the regulation of the sale of medicine;* in other words, the state is no longer dealing with the recognized abuse due to the liquor traffic, but is dealing solely with the sale of medicine.

It is probably true that different kinds of medicine may be differently regulated, and that drastic restrictions may be applied to virulent poisons and not applied to harmless remedies, but the court will have in mind that in this instance we are dealing with a complete prohibition, and it is the contention of plaintiff in error that no single medical remedy may be selected for such prohibition. In other words, it is conceivable that the use of strychnine as a heart stimulant is accompanied by the danger of overdosage and may be of hurtful, if not fatal, effect, but it is not conceivable that the state could prevent the sale of strychnine, not permitting its use for any purpose, and make such a prohibitory regulation effective only upon the subject of the one drug. It is true that this could be done if the drug could be used only for harmful pur-

poses, but in view of its value as a strengthening agency for heart weakness, certainly the state could not reach out the arm of its police power and destroy such a remedy, completely overlooking all other forms of poisons which might be in the same category.

Ordinance Denies Equal Protection of Law.

It is said that a police regulation, like any other law, is subject to the equal protection clause of the Fourteenth Amendment.

> Geiger-Jones Company v. Turner, 230 Fed. 233, 244.

In the case just cited the court had under review the so-called "blue sky" law of the state of Ohio. This law contained a provision, among others, that in any given issue of bonds by a corporation, if more than fifty per cent of the bonds were sold to a single purchaser, such issue should not be embraced within the act and its regulatory provisions should not be applicable thereto. In his opinion the district judge said:

> "The residue of the bonds, whether worthless or of value, may be sold without the supervision which the law provides. Another corporation of similar or precisely the same character, having no single purchaser for a majority of its bonds, is subjected to the onerous provisions of the law, although its securities may be of the highest financial character."

The court condemned the law upon this ground, among others, contending that it denied the equal protection of the law.

In the case of Atchison, Topeka & Santa Fe Railway Co. v. Vosburg, 238 U. S. 56, this court, speaking through Mr. Justice Pitney, and referring to the equal protection clause of the Fourteenth Amendment, declared unconstitutional the reciprocal demurrage law of Kansas, because of an inviduous discrimination between the shipper and the carrier upon the question of attorneys' fees. The law contained a section providing that when the carrier failed to furnish cars to the shipper he should be liable for actual damages, for an arbitrary penalty of five dollars per day for each car not supplied, and for a reasonable attorney's fee. Shippers who failed to use cars placed at their disposal were made subject to a penalty but were not liable for an attorney's fee. This court said:

> "We agree that this legislation is properly to be regarded as a police regulation, and in that respect differs from the act that was under consideration in the Ellis case, *supra*, which simply imposed a penalty upon railroad corporations for a failure to pay certain debts. But we cannot at all agree that a police regulation is not, like any other law, subject to the 'equal protection' clause of the Fourteenth Amendment. Nothing to that effect was held or intimated in any of the cases referred to. The

> constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation. Thus, in Atchison, Topeka etc. R. R. Co. v. Matthews, *supra*, the responsibility imposed upon railroad companies for attorneys' fees in addition to damages was sustained because designed to enforce care on the part of those companies to prevent the communication of fire and the destruction of property along their lines—a duty imposed upon them and not upon the owners of the property. We need not review the decisions; the subject being so familiar that extended discussion is unnecessary."

The right to enact appropriate legislation upon the subject of intoxicating liquors unquestionably implies the right to confine the enactment to that particular subject, assuming that the regulation is strictly and substantially a regulation of "intoxicating liquor." The regulation of the sale of medicinal liquor would undoubtedly fall within this category ordinarily, but only in so far as the regulation of such liquor is a necessary concomitant to the regulation of the sale of liquor for beverage purposes, would it be appropriate to such a regulatory enactment. But a prohibition of liquor for medicinal pur-

poses, whether that prohibition, as in this instance, is done by indirection, or whether an express prohibition, cannot be denominated a *regulation of intoxicating liquor only, but is, and becomes, a prohibition of a medicine.* In other words, the prohibition of any form of medicine is something more than a mere regulation of the given subject of control, and constitutes the suppression of a medicine, which, standing alone, is a discriminatory act if applied to a single medicine.

It is respectfully urged that the sale of medicinal liquor, or medicinal preparations or compounds, where they are deemed to have a beneficial effect, is entitled as much to the shield of the "equal protection" clause of the Fourteenth Amendment as it is to the "due process" clause of the same amendment.

Limitations of Police Power.

It is, of course, no simple task to mark the limitations of the police power. Indeed, it was said by Mr. Chief Justice Taft, in his dissenting opinion in Adkins v. Children's Hospital, 261 U. S. 525, at page 562:

> "The boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments to the Constitution is not easy to mark."

But in the majority opinion in the same case this court referred to the language of Mr. Justice Peckham, speaking for the court in Lochner v. New York, 198 U. S. 45.

Certain excerpts were taken from the opinion of the distinguished Justice, which, in the belief of the writer, are appropriate to the case at bar.

In the Adkins case this court held the Act of September 19, 1918, fixing a minimum wage for women and children in the District of Columbia to be unconstitutional, in that it was an invasion of the right of liberty and contract, preserved by the Fourteenth Amendment, and in the Lochner case a similar conclusion was reached with reference to the so-called labor law of the state of New York, which limited the hours of employees of bakeries. The following is taken from the Lochner case opinion, as quoted and approved in the Adkins case:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the po-

> lice power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. * * *
>
> "It is a question of which of two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

And the language of Justice Peckham, taken from the Lochner case, it seems, is applicable to the ordinance under consideration in the case at bar, when the justice said:

> "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with. * * *"

And in the recent case of Meyer v. The State of Nebraska, decided June 4, 1923 (see U. S.

Supreme Court Advance Opinion, No. 17, July 2, 1923, page 699), the meaning of the word "liberty" as used in the Fourteenth Amendment is again defined *in extenso* by Mr. Justice McReynolds:

> "Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, *to engage in any of the common occupations of life*, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Citing decisions.)

And again:

> "The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. * * *
>
> "The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. * * * Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire

knowledge, and with the power of parents to control the education of their own. * * *

"The desire of the Legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state, and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown."

The Supreme Court of the state of Florida has taken an advanced position, and one which may be said to have opened a new and important avenue of thought, in the case of Hall v. Moran, 89 Southern (Fla.) 104.

The court of last resort in that state said that the authority of Congress extends to all matters within the federal power. The concurrent power, expressed in the Eighteenth Amendment, is conferred upon the state to enforce the prohibitions of that amendment, but not to regulate rights and privileges of citizens, expressly granted by Congress, consistent with the Eighteenth Amendment, and protected by the Fourteenth Amendment. In the opinion it was asserted that where an act of Congress

expressly confers a right or privilege upon persons, including citizens of the United States, to possess particular property in a stated place, and such expressly conferred privilege does not violate the paramount law, and does not directly menace the public welfare, and is not possessed or used for an unlawful purpose, a state law may not be enacted to abridge or deny the privilege thus extended. The following language is taken from the decision in the case of Hall v. Moran, *supra:*

> "The provisions of the Fourteenth Amendment that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' do not preclude the state from exercising under proper circumstances its inherent police power to conserve the general welware; but where an act of Congress expressly confers a right or privilege upon persons, including citizens of the Unitd States, to possess particular property at a stated place, and such expressly conferred privilege to possess property does not violate paramount law, and the article possessed was lawfully acquired, and it does not directly menace the public welfare, and is not possessed or used for an unlawful purpose, a state law penalizing such possession when that possession is expressly permitted by Congress within the federal power is a denial or curtailment of a right expressly conferred by the federal power, and perhaps also abridges the privileges and immunities of the citizens of the United States in violation of the Four-

teenth Amendment. In either event the federal law is dominant and renders inoperative the conflicting state provision."

Professional Vocations May Not Be Prohibited.

In the discussion of constitutional questions, counsel ordinarily look to the decisions of this court as a guide in interpreting the law and in supporting their argument, but from time to time one finds among the decisions of the courts of last resort of various states adjudications which are so pertinent, so ably discussed and considered, and in the opinions of which there is such cogent and enlightening discussion, that the citation of, and the quotation from, such decisions are induced.

With the comparatively small grist of litigation passing through the Supreme Courts of some of the less populous states, we find from time to time an opinion so interpretively written and delivered that we are induced to take from it such excerpts as are appropriate to the discussion under way.

The Supreme Court of the state of Nevada in 1910 declared that the Act of 1909 of the Legislature of that state, making it unlawful for any corporation, partnership, firm or individual to engage in the banking business except by means of a corporation duly organized for

such purpose, was void, by reason of its conflict with the terms of the Fourteenth Amendment, and the appropriate provisions of the Nevada Constitution. In that case the Supreme Court stated that no good reason appeared for upholding as a police regulation a statute which conferred no benefit to the public, and which resulted only in injury by prohibiting persons from following a beneficial vocation. It said:

> "The Legislature may regulate when regulation will protect, but may not suppress when inhibition will injure the party pursuing the lawful vocation and proper regulation will prevent injury to others."

No language more appropriate to the state of facts in the case at bar could be found. If the Legislature of California or the legislative body of one of its political subdivisions may prohibit the sale of medicinal liquor and the prescription of the same for remedial purposes, it may then pass similar laws as to other kinds of medicine with the result that the practice of medicine will be destroyed. The language of the Nevada case is most appropriate.

> *Marymont v. Banking Board,* 33 Nev. 333.

The following forceful discussion is taken from the opinion in the Marymont case:

> "If the Legislature can prohibit the individual from engaging in the banking busi-

ness, as our statute seeks to do, it is evident that it may also prohibit corporations from engaging in the business, for a corporation, which is merely a creature of the law, can have no greater fundamental rights than the individual, for whom the constitutional guaranties are directly provided. Therefore, if both the individual and the corporation may be prohibited, this business, so essential to the carrying on of commerce and trade, and so necessary to the welfare of the state, may be entirely suppressed. *The sustaining of this statute would be an entering wedge and a precedent which would authorize further encroachments upon the rights assured to our citizens by the Constitution.* If we should uphold as valid this act, denying to individuals the right to embark in the banking business, and the next Legislature should pass another providing that corporations could not engage in that pursuit, we perceive no ground upon which that act could be held invalid which would not apply to the present one. We have different statutes regulating mining and providing for the safety of the men employed. The desirability and validity of laws for the prevention of the spread of contagious diseases among animals and certain pests which destroy agricultural crops are recognized.

"If the next Legislature should pass a law prohibiting individuals from engaging in the business of mining and farming, and later in the session should pass another act providing that corporations should not engage in either of these pursuits, there would be no reason for holding such acts invalid which would not apply to the statute under consideration. If the argument in favor

of this act is good, the same would be sufficient to support legislative enactment prohibiting individuals and corporations not only from engaging in banking, mining, farming and the raising of live stock, but from merchandising, keeping hotels, operating factories and pursuing other vocations. Qualifications, examinations and regulations are prescribed for the practice of law, medicine and dentistry. If the individual may be denied the right to engage in the business of banking, may not the right to follow the various professions be limited to corporations, or even denied to both individuals and corporations? If the state has the right to prohibit the citizen from following ordinary pursuits, may not the Legislature exercise a less restrictive power, and either for a price or without charge farm out to individuals, corporations and monopolies the right to pursue the various vocations upon which the people depend for their living and prosperity?"

Mr. Tiedeman, in his work on "The Limitations of Police Power," says that in order to prohibit the prosecution of a trade altogether, the injury to the public must follow from the inherent character of the business. Where it is possible to conduct the business with harm to the public, police regulations may be made to suppress the evil, licensing may be required, heavy penalties may be imposed for an infraction of the law, but, if the business is not harmful, the prosecution of it cannot be rightfully prohibited to one who will conduct the business in a proper and circumspect manner.

Again, in the Marymont case, a quotation was taken from the full and expertly considered opinion in the case of State v. Scougal, 3 S. D. 55, in which case the South Dakota court declared that the individual could not be prohibited from engaging in the business of banking. The tendency of legislatures to press into some form of enactment regulations to control all forms of business and vocations is one which is present at all times, and the courts have been obliged, during the entire history of our country, to declare laws to be void which constituted a clear and unmistakable invasion of the right of citizens to the pursuit of harmless callings and constructive vocations.

Also, see

Carter v. Coleman, 84 Ala. 256;
Youngblood v. Birmingham Trust Co., 95 Ala. 521.

SUMMARY.

In concluding his argument, plaintiff in error is not insensible to the fact that druggists have been suspected of violating prohibition laws and ordinances. Whether this belief is justified is not, in the judgment of the writer, a matter which is material here. In view of the effective and drastic regulations imposed on the liquor traffic under the authority of the Eighteenth

Amendment and the National Prohibition Act, as well as under the sweeping regulations made upon the same subject by the internal revenue commissioner, there is no opportunity for the druggist to engaged in any such traffic now, as he is under the strictest surveillance of the law.

This argument is not made for the purpose of creating or preserving the right of any person within the jurisdiction of the United States to use intoxicating liquor for other than purely a medicinal purpose. Plaintiff in error is contesting this case solely to preserve his right to sell that merchandise which is a proper and natural object of sale, namely, medicinal liquor.

There are many destructive agencies and dangerous objects made the subject of commerce and trade. Under its police power it has been well established that the state may regulate the storage of inflammables and explosives, and municipalities may designate districts within which such materials may be stored. The state and its political subdivisions may enforce all necessary regulations to render the storage of such materials safe. The manufacture of explosives, such as gunpowder and dynamite, may also be strictly regulated as to the place of manufacture, the machinery thereof, and the use of devices for the protection of persons engaged in their manufacture. The sale, transportation, use and display of lethal weapons are also

proper subjects of legislation by a state or its political subdivisions under the police power inherent in the sovereignty. Regulations necessary to enforce the quarantine of persons and animals suffering from contagious and infectious diseases may be enacted and enforced. The fumigation of trees, shrubs and plants for the purpose of protecting the same from destruction by insects, scale and diseases of such vegetation is a proper subject of state regulation and control.

But, it would be indeed a destructive measure, unconstitutional and invalid in its inception, which would prohibit the manufacture and sale of explosives, inflammables, firearms and weapons, because all these things have a necessary and essential purpose to a limited extent, and for this purpose these objects and materials are indispensable. It is likewise true that while the state may control the spread of contagion by effective quarantine measures, and may likewise preserve trees and plants by appropriate measures to protect them from the diseases which ravish them, yet the Legislature may not go so far as to prohibit the free contact of persons, not suffering from disease, because of the mere possibility that they may have the contagion, nor may they prohibit the planting and growth of trees and shrubs merely because they may become diseased.

In other words, the mere possibility of misuse, or abuse, is not sufficient ground upon which to predicate a sweeping prohibition of a useful object, custom, use or vocation.

It is submitted and strongly urged that as the sale of medicinal liquor has a proper object and has a common and legitimate use, its continuance as a part of the treatment of disease and the stimulation of the human body may not be prevented by legislative decree; also, that the prescription and sale of such liquor for medicinal purposes may not be so restricted and controlled as to create by indirection a prohibition upon the same.

It is urged that the California court has erred in its decision that the sale of alcoholic liquor for medicinal purposes may be prohibited, or that it may be singled out of medicinal substances as the sole object of a prohibition when other substances, used for like or similar purposes, are permitted to be sold, notwithstanding their use is accompanied by more dangerous possibilities.

The decision of the District Court of Appeal should be reversed by the decree of this court.

Respectfully submitted,

RAY E. NIMMO,

Counsel for Plaintiff-in-Error.

SUPPLEMENT.

Excerpt From the Journal of the American Medical Association, June 3, 1922, Page 1709.

"Whereas, the medical profession has been subjected to criticism and unfavorable comment because of present conditions associated with the enforcement of the Volstead law, and

Whereas, the result of a referendum conducted by the Journal of the American Medical Association, covering 54,000 physicians, indicates that 51 per cent of physicians consider whisky "necessary" in the practice of medicine, and

Whereas, the dosage, method, frequency and duration of administration of this drug in any given case is a problem of scientific therapeutics and is not to be determined by legal or arbitrary dictum, and

Whereas, the experience of physicians (as reported in The Journal), indicates the present method of control, limitation of quantity and frequency of administration, licensure and supply of a satisfactory product constitutes a serious interference with the practice of medicine by those physicians who are convinced of the value of alcohol in medical practice, therefore be it

Resolved: That the House of Delegates of the American Medical Association, in convention assembled, representing a membership of over 89,000 physcians, appeals to the Secretary of the Treasury and to the Congress of the United States for relief from the present unsatisfactory conditions, and recommends that provisions be made for supplying bonded whisky for medicinal use only, at a fixed retail price to be established by the government."

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1923.

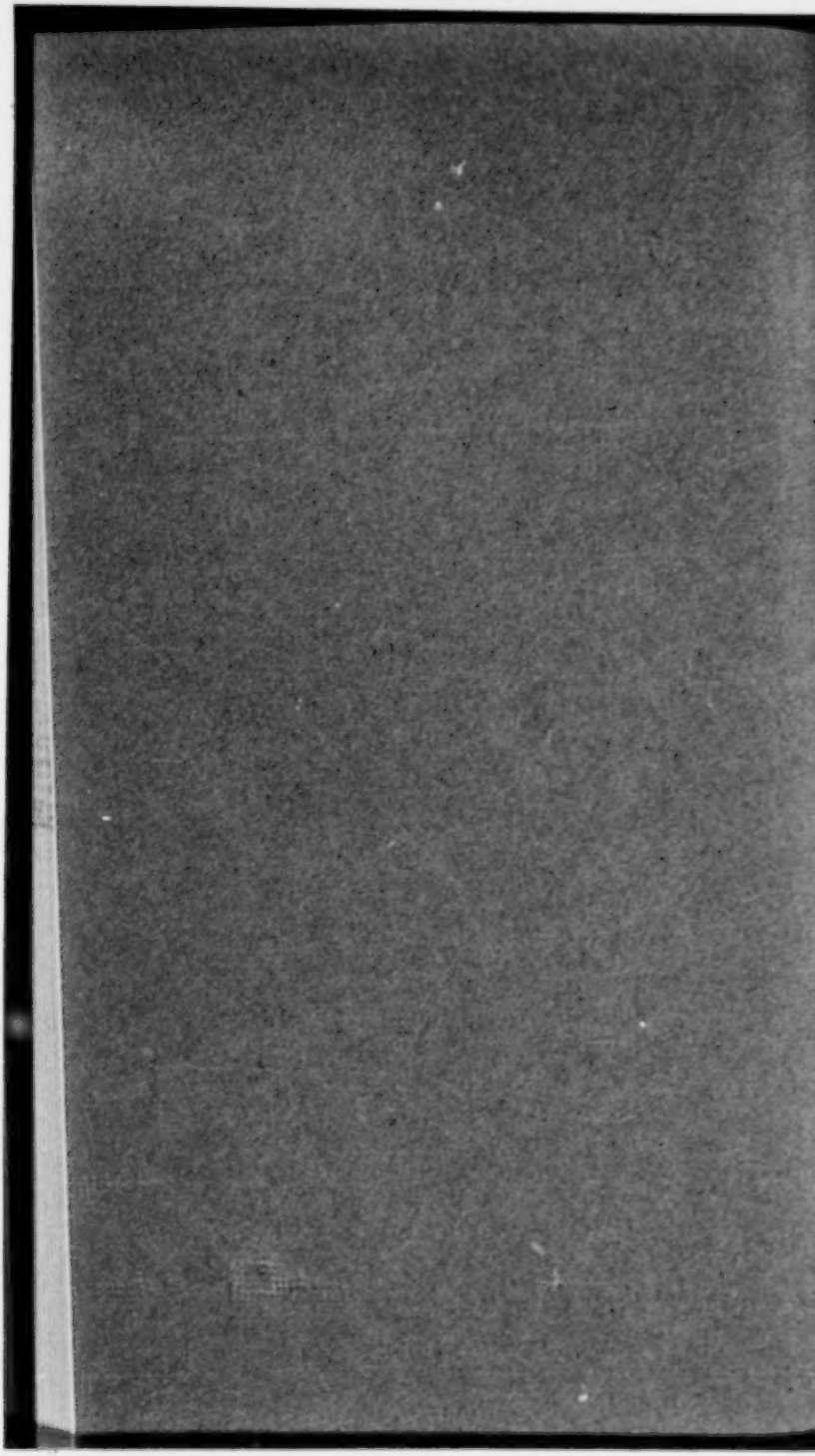
No. 420.

Merlin W. Hixson,
Plaintiff in Error,
vs.
Louis D. Oakes,
Defendant in Error.

Brief on Behalf of Defendant in Error.

J. M. Friedlander,
City Prosecutor, City of Los Angeles,
S. W. Odell,
Of Counsel,
Attorneys for Defendants in Error.

Parker, Stone & Baird Co., Law Printers, Los Angeles.



TOPICAL INDEX.

PAGE

History of Facts 3

Argument 5

I.

There Is no Conflict Between the Portions of the Said City Ordinance Here Involved and the Federal Legislation Applying to the Same Subject Matter. Both the Federal Legislation and the Said City Ordinance Are Consistent and in Harmony 7

II.

The Medicinal Use of Whiskey, in Beverage Form, Being a Mooted Question, the Contention That It Possesses Therapeutic Value, Places the Plaintiff in Error in an Anomalous Position..... 10

III.

The Ordinance, Though Certain Portions of It Are Inoperative, Is Essentially a Prohibitory Ordinance 20

IV.

The Said City Ordinance Is Not Invalid Because Certain Portions Thereof Penalize the Sale of Alcoholic Liquors Without a License..... 24

V.

The City, in the Exercise of Its Police Power, Has the Inherent Right to Prohibit the Use of Intoxicating Beverages as Medicines, Even Though the Said Beverages Might Not Only Be Beneficial but Even Sometimes Necessary..... 26

VI.

The Right of a Municipality to Regulate the Prescription of Alcoholic Liquor, Founded Upon an Inherent Police Power, Does Not Contravene the Provisions of the Fourteenth Amendment of the Constitution of the United States. The Right of a City to Pass an Ordinance Which, in Effect, Regulates the Prescription of Alcoholic Liquor, in Beverage Form, for Med-

PAGE

icinal Purposes, Does Not Deprive the Plaintiff in Error of Those Constitutional Guaranties Contained in the Fourteenth Amendment..... 47
In Refutation 69
Conclusion 75

TABLE OF CASES.

Abeel v. Clark, 84 Cal. 226..... 16
Alabama, in McAllister v. State, 47 So. 161..... 36
Bacon v. Walker, 204 U. S. 311..... 57
Beer Co. v. Massachusetts, 97 U. S. 25..... 57
Bowman v. Chicago etc. R. Co., 125 U. S. 465..... 58
Collector v. Day (11 Wall. 113, 124)..... 57
Commonwealth v. Nickerson, 236 Mass. 281, 128 N. E. 272..... 26
Commonwealth v. Nickerson, 128 N. E. 273..... 64
Dent v. West Virginia, 129 U. S. 112..... 19
Druggists' Cases, 85 Tenn. 449, 458..... 52
Eberle v. Michigan, 232 U. S. 700..... 75
Ex parte Pappas (Cal.), 207 Pac. 483..... 26
Ex parte Finnegan, 270 Federal 665..... 26
Falstaff Corporation v. Allen, 278 Fed. 643....41, 43, 46
French v. Davidson, 143 Cal. 658..... 16
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 58
Grundling v. Chicago, 177 U. S. 188..... 19
Hawker v. New York, 170 U. S. 189..... 19
House v. Mayes, 219 U. S. 270..... 63
Houston etc. R. Co. v. Mayes, 201 U. S. 321..... 58
In re Pappas, 57 Cal. App. 432 and 438..... 24
In re Tosello, 57 Cal. App. 509..... 24
James Clark Distilling Co. v. Western Maryland Railroad Co., 242 U. S. 311..... 75
Keller v. U. S., 213 U. S. 138..... 57
Lake Shore etc. R. Co. v. Ohio, 173 U. S. 285..... 57

PAGE
Lambert v. Yellowley, 291 Fed. 640 69
Lawton v. Steele, 152 U. S. 133 50
Licenses Cases (5 How. 504, 583) 56
McLean v. Denver etc. R. Co., 203 U. S. 38 58
Missouri etc. R. Co. v. Haber, 169 U. S. 613 57
Motlow v. State, 125 Tenn. 547 ..... 65, 67
Mugler v. Kansas, 123 U. S. 623 57
Nutting v. Mass., 183 U. S. 553 19
Patterson v. Kentucky, 97 U. S. 501 57
People v. Tomasovich (Cal.), 206 Pac. 119 26
People v. Velarde (Cal.), 188 Pac. 59 26
Phillips v. Mobile, 208 U. S. 472 75
Piel Bros. v. Day, 278 Fed. 223 ..... 43, 45
Powell v. Pennsylvania, 127 U. S. 678 ..... 29, 31, 45
Rippey v. Texas, 193 U. S. 504 33
Robbins v. Shelby County, 120 U. S. 489 58
Ruppert v. Caffey, 251 U. S. 264 37
Sioux Remedy Co. v. Cope, 235 U. S. 197 57
Soon Hing v. Crowley, 113 U. S. 708 19
State v. Andrews, 188 Ia. 626 36
State v. Barksdale, 107 S. E. 505 32
State v. Brothers, 175 N. W. 685 27
State v. Craft, 246 S. W., 930 26
State v. Moore, 212 Pac. 349 60
The Purity Extract Company v. Lynch, 226 U. S. 192 ..... 39, 41, 45
U. S. v. Lanza, 260 U. S. 377 58
Vigliotti v. Commonwealth, 258 U. S. 403 25
Woods v. the City of Seattle, 270 Fed. 315 35

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1923.

No. 420.

Merlin W. Hixson,
Plaintiff in Error,
vs.
Louis D. Oakes,
Defendant in Error.

Brief on Behalf of Defendant in Error.

HISTORY OF FACTS.

The plaintiff in error is a licensed pharmacist, engaged in the drug business in the city of Los Angeles. He was charged and convicted in the Police Court of Los Angeles, of violating section 5, subdivision c, of Ordinance No. 37699 (N. S.) of the City of Los An-

geles (designated as Exhibit "A" and contained on page 13 in the transcript of record of the plaintiff in error), which provides:

> "Sec. 5. Nothing in the preceding sections of this ordinance shall be construed as rendering unlawful:
>
> "(c) The filling only, at pharmacies, on the date of issuance, but not the refilling, of prescriptions calling for not to exceed eight ounces of alcoholic liquor each. Every such prescription shall be issued, signed and dated by a duly licensed physician, and shall have endorsed upon it by such physician the name and address of the person for whose use such prescription is made and the statement that in his opinion the liquor prescribed is required by such person as a medicine. No other form of prescription shall be deemed to be within the intent of this section. All alcoholic liquor so dispensed shall be placed in corked or sealed bottles and delivered to the purchaser in the public room of the pharmacy or sent to any given address, but shall not be consumed on the premises where dispensed. All such prescriptions shall be kept on file for one year and open at all times to public inspection while the pharmacy is open for business."

The title of said ordinance, evidencing the intention thereof, is as follows:

> "An ordinance prohibiting saloons; and prohibiting the sale of distilled alcoholic liquors; and regulating the sale and service

of vinous and malt alcoholic liquors, within the city of Los Angeles."

The said ordinance was adopted prior to the passage of the National Prohibition Law, as an initiative measure, by the electors of the city of Los Angeles.

The plaintiff in error seeks generally through the proceedings of *habeas corpus*, to invalidate and vitiate the said ordinance, and more particularly he finds section 5, subdivision c, as most obnoxious and nocuous. He urges, therefore, the proposition that the said ordinance violates the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT.

Candidly, we believe that little can be added to the very able opinion of the Honorable Frank J. Finlayson, presiding justice of the District Court of Appeal of the State of California, Second Appellate District. It covers so very fully and comprehensively the various phases and issues involved in this case, that it is not only a veritable brief, but a valuable treatise of great legal merit upon the subject matter it embraces.

It will be the earnest endeavor of the defendant in error not only to submit the said opinion of Judge Finlayson, as decisive of the legal view-

point of the state of California, and as the major portion of this brief, but to simply and concisely place before this Honorable Court the following contentions for its consideration.

With propriety, we believe that we can admit at this time that the defendant in error leans, in no small measure, for support of the propositions advanced to sustain the validity of said ordinance, upon the erudite exposition rendered by the judge below.

The defendant in error urges for the attention of this court, that:

(1) There exists no conflict between the said portion of the said city ordinance, here involved, and the federal legislation applying to the same subject matter, and that both federal legislation and the said section of the said city ordinance are consistent and in harmony with each other;

(2) That the medical use of whiskey, in beverage form, being a mooted question among those of the medical fraternity, the contention that it possesses a therapeutic value places the plaintiff in error in an anomalous position;

(3) That the said ordinance, though certain portions thereof are inoperative, is essentially in its very character prohibitive;

(4) That the said city ordinance is not invalid because certain portions thereof penalize the sale of alcoholic liquors without a license;

(5) That the city, in the exercise of its police power, has the inherent right to prohibit intoxicating beverages, even though the said beverage might not only be beneficial, but even sometimes necessary;

(6) The right of a municipality to regulate the prescription of alcoholic liquor, founded upon an inherent police power, does not contravene the provisions of the Fourteenth Amendment of the Constitution of the United States. The right of a city to pass an ordinance which in effect regulates the prescription of alcoholic liquor, in beverage form, for medicinal purposes, does not deprive the plaintiff in error of those constitutional guaranties contained in the Fourteenth Amendment.

I.

There Is no Conflict Between the Portions of the Said City Ordinance Here Involved and the Federal Legislation Applying to the Same Subject Matter. Both the Federal Legislation and the Said City Ordinance Are Consistent and in Harmony.

A careful reading of both the ordinance and the federal legislation will disclose that there is

no conflict between the respective provisions, as is very aptly summarized by the court below in the following language:

"It will be noticed that while the city ordinance limits to eight ounces (half a pint) the amount which may be prescribed and sold at any one time for medicinal use, it places no limitation upon the number of prescriptions which may be made and filled for the same person within any fixed period of time. So that, at the time of the adoption of the ordinance, a physician, if in good faith he deemed it necessary, could every day, and perhaps more than once on every day, issue for any patient a prescription for alcoholic liquor, provided each prescription called for not more than eight ounces. This he could continue to do until such time as his patient no longer needed the stimulant. And it was not unlawful for a licensed pharmacist to fill such daily prescriptions, provided no one of them called for more than eight ounces. It further will be noticed that though the Volstead act permits a pint (sixteen ounces) of spirituous liquor to be prescribed by a physician for the use of a patient, not more than that amount may be prescribed for the same person within any period of ten days, and no prescription shall be filled more than once." [Transcript of Record, page 93, folio 278; p. 94, folio 280.]

The part of section 7 of the Volstead law, pertaining to the amount of spirituous liquor to be taken internally, is as follows:

> *"Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once."* (Italics ours.)

It must be noticed that the language of the section, which we believe is important in the construction of conciliating both the Volstead law and the said city ordinance, adopts the phrase "not more than one pint," limiting thereby the maximum and not the minimum. It was, therefore, perfectly proper for the city of Los Angeles to make it less than a pint, rather than a greater quantity.

Every effort (we are impressed with the rule of construction pertaining thereto) should be bent towards sustaining this ordinance. Under our view of this matter, there is no difficulty in construing the Gandier ordinance so that it will not conflict with the federal enactments. We believe ourselves correct in the assertion that this court is not interested in the possibilities of declaring the ordinance invalid, but is concerned only with the question: *Can it apply a construction which renders the ordinance effective and constitutional without doing violence to its language?*

II.

The Medicinal Use of Whiskey, in Beverage Form, Being a Mooted Question, the Contention That It Possesses Therapeutic Value, Places the Plaintiff in Error in an Anomalous Position.

The therapeutic value of whiskey is so questionable that the United States Pharmacopoeia has entirely omitted it from its last issue. [See transcript of record, page 83, folio 248]. The United States Pharmacopoeia, as a work of its kind, is of undoubted reliable authority. Since physicians, among themselves, do not agree as to the medicinal value of whiskey [see transcript of record from page 47, folio 141, to page 90, folio 270], it is submitted that under the circumstances, the people of the city of Los Angeles had the inherent right to determine for themselves the manner and method in which it is to be regulated. That they have done, by the passing of the so-called Gandier ordinance, which is a law adopted by the people direct. The Gandier ordinance seeks methodically, systematically and scrupulously to control, supervise and regulate the sale of medicinal liquors.

It must be conceded generally that physicians are at great variance as to the medicinal use and value of whiskey. The unfoldment of modern medicine developed so many superior

therapeutic agents, that the modern school looks with depreciating favor upon whiskey as a medicine. Even those physicians who are the proponents of the use of whiskey for medicinal purposes, contend that even sixteen ounces are insufficient and urge that the quantity of whiskey to be prescribed should be entirely a matter left to the sound discretion of the physician.

It is quite apparent, therefore, that the question here involved goes not only to the validity of the city ordinance, here under attack, but also to the validity of the provisions of the Volstead law that pertain to the same subject matter, wherein it prohibits the prescription of more than sixteen ounces of liquors for medically treating the sick and the afflicted. The plaintiff in error zealously contends that the amount *must* be left to the sound discretion of the attending physician. The inevitable conclusion from such premise follows that the Volstead law and the Gandier ordinance, both regulating *in the same manner* medicinal whiskey in a supposedly arbitrary way, are invalid, because it is an invasion of the right each doctor has under the Constitution of the United States, guaranteeing that he will not be deprived of his liberty to treat his patient in a manner he sees fit. Along the same line of reasoning, the patient has a similar right.

The position, as well as the contention, of the plaintiff in error appears somewhat inconsistent upon close scrutiny. His position must, of necessity, contain the following premises, which are irreconcilable:

(1) A citizen cannot be deprived of his liberty to be treated by his physician in a manner in which the physician, in his sound discretion, deems most available. (It must be noted that neither the patient nor the physician are parties to this writ of error.)

(2) The plaintiff in error must admit that the medical fraternity, on account of the great variance of opinion on the subject, strongly doubts the use of whiskey as medicine.

The conclusion would follow, as a reasonable deduction from the foregoing premises, that the plaintiff in error contends that he has an inalienable guaranty, under the Constitution, to dispense upon prescription a doubtful remedy. It is earnestly contended by the respondent that since the therapeutic value of whiskey is doubtful, and it is undoubted at least that whiskey is as injurious as it is doubtful, it must logically follow that the people, in this instance, were warranted in determining for themselves what course would subserve best the interest and welfare of their community.

In the instant case there was no question that the plaintiff in error had filled a prescription consisting of a sixteen ounce bottle of whiskey of the same quality, fineness and strength that was formerly dispensed, prior to the adoption of the Eighteenth Amendment, over the bar in a saloon—and we believe we are justified in saying that since the Eighteenth Amendment there is at least this noticeable change—that the agency, the mode of procedure, and the nomenclature have been somewhat revised, creating perhaps a more refined atmosphere and intellectual environment, but the unalterable fact remains, however, that we are still contending with almost a similar situation.

Under these circumstances, it is therefore urged by the respondent that the people of the city of Los Angeles, actuated by a desire, expressed by them through the polls, to accomplish more effectively the objects sought to be achieved by prohibition, have the natural right, since their health, morals, safety and welfare are involved, to decide in what doses medicinal whiskey should be dispensed to them when they are sick and afflicted.

Can Congress, or the state, or a subdivision thereof, under its police power, regulate or prohibit the sale and use of alcoholic liquors for medicinal purposes?

The restriction which the Volstead act places on the use of alcoholic liquors for medicinal purposes is undoubtedly within the authorized powers of Congress under the concurrent grant of police power from the states to Congress by section 2 of the Eighteenth Amendment.

Congress might go so far as practically to prohibit the traffic in alcoholic liquors used ostensibly for medicinal purposes. For it is a debatable question whether alcoholic liquors are medicinal, although heretofore erroneously so considered. The evidence taken in the case at bar indicates that a majority of physicians do not consider alcoholic liquors as medicinal, and do hold that there are substitutes which are much better because they do not have the habit-forming tendency of alcoholic liquors. The question being an open one, or perhaps having the weight of evidence in favor of the non-medicinal character of alcohol, it is a question which Congress, under the power given it, can determine. Congress, however, has not gone so far as to prohibit the use of alcoholic liquors as medicine, but has adopted, in the Volstead act, regulations tending at least to minimize their fraudulent use as beverages in the guise of medicine.

The state, likewise, under its police power, can regulate, and even prohibit, the sale and

use of alcohol as a medicine, in its effort to stop the liquor traffic. It follows that a subdivision of the state vested with police power has the same right. The Gandier ordinance was adopted by the city of Los Angeles under the police power granted to the municipality by the Constitution of the State of California.

In considering the right of the state to regulate, or even prohibit, the sale and use of alcohol for medicinal purposes, it must be borne in mind that the state prescribes not only what qualifications a person must possess before being licensed to practice medicine, but the state, in safeguarding the people, has prescribed as well how such person should qualify, thereby placing certain limitations upon the manner necessary to qualify to practice medicine. Does it not, therefore, logically follow that the state, in the exercise of the same right, may legislate as to the manner in which such person may practice medicine, at least in so far as it pertains to the health, morals or safety of the public?

It is well established in California that, under its police power, the state can so far regulate the practice of medicine as to compel the vaccination of all children attending the public schools.

In Abeel v. Clark, 84 Cal. 226, the court held:

> "It is suggested that the subject of the vaccination act is not within the scope of a police regulation. The legislature has power to enact such laws as it may deem necessary, not repugnant to the Constitution, to secure and maintain the health and prosperity of the state, by subjecting both persons and property to such reasonable restraints and burdens as will effectuate such objects."

In upholding the decision in the case of Abeel v. Clark, *supra*, the same court, in French v. Davidson, 143 Cal. 658, uses the following language:

> "The children of plaintiff were denied admission to the public schools of the city of San Diego for the reason that they had not been vaccinated. The plaintiff seeks a writ of mandate to compel the admission of his children to the said schools without being vaccinated. The writ was denied and the plaintiff appeals. * * * As this question has already been settled in a well-considered case by this court, the plaintiff's appeal from the judgment herein may be briefly disposed of. (Abeel v. Clark, *supra*.) * * * That the Vaccination act comes within the police power of the legislature of the state, and that it is for the public good, is clearly maintained by the opinion. It is also shown that the act in no way impairs any consti-

tutional provision against special legislation. Upon the questions treated of in that decision, little need be here added. Its soundness has never been questioned, so far as we are able to ascertain. The case has been frequently cited and the principle of it approved both in this and other states. * * * It in no way interferes with the right of the child to attend school, provided the child complies with its provisions. Police regulations generally interfere with the liberty of the citizen in one sense. To arrest a man for a breach of the peace is an interference with his liberty. It is no valid objection to a police regulation that it prevents a person from doing something that he wants to do or that he might do if it were not for the regulation. When we have determined that the act is within the police power of the state, nothing further need be said. The rest is to be left to the discretion of the law-making power. It is for that power to say whether vaccination shall be had as to all school children who have not been vaccinated all the time, or whether it shall be resorted to only when smallpox is more than ordinarily prevalent and dangerous. (Bissell v. Davison, 65 Conn. 191.)

"Nor does the Fourteenth Amendment, or any other part of the federal constitution, interfere with the power of the state to prescribe regulations to promote the health and general welfare of the people. 'Special burdens are often necessary for general benefits.' 'Class legislation, discriminating against some, and favoring others, is prohibited, but legislation which, in carrying out a public purpose is limited

> in its application, if within the sphere of its operation it affects all persons similarily situated, is not within the amendment.' (Barbier v. Connolly, 113 U. S. 27.)"

This position is also supported by:

> Abney v. Fox (Tex.), 250 S. W. 210;
> Zucht v. King (Tex.), 225 S. W. 267.

In upholding this point of view in Jacobson v. Mass., 197 U. S. 11, the Supreme Court said:

> "There are manifold restraints to which every person is necessarily subject for the common good. * * * This court has more than once recognized it as a fundamental principle that persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state."

In support of this contention we might cite the following cases:

> Barbier v. Connolly, 113 U. S. 27;
> Bissell v. Davison, 65 Conn. 183, 191;
> *In re* Rubenack, 62 Mo. App. 8, 10.

Those of the medical fraternity who are proponents of medicinal whiskey bitterly resent interference on the part of the government with their discretion in prescribing the use thereof.

It is not the intention of the respondent to impute in the least way anything derogatory to a profession so honorable and ancient as that

of medicine. It is indeed with great deference and profound appreciation, in the light of its many extraordinary accomplishments, that we wish to join with the rest of the civilized world to pay, perhaps in our humble way, the respect and tribute that is justly due it. We challenge, however, the contention so aggressively asserted by the proponents of medicinal whiskey, that the great feats of medicine were either accomplished by or through the use of whiskey.

It has been found necessary, and the principle of law well settled, that the government has a right to regulate trades, businesses and professions which might in any degree hamper or impair the welfare of the community, even to the extent of depriving those engaged in such hazardous, or near hazardous, occupations of liberty and property. For authority on this proposition, we cite:

Dent v. West Virginia, 129 U. S. 112;
Soon Hing v. Crowley, 113 U. S. 708;
Grundling v. Chicago, 177 U. S. 188;
Nutting v. Mass., 183 U. S. 553;
Hawker v. New York, 170 U. S. 189.

The vice that might result from want of regulation of trades and professions is very apparent. With the permission of this Honorable Court, we might indulge ourselves in the fol-

lowing hypothetical situation, which might follow as a necessary sequence, if there were lack of regulation:

Supposing, in the sound discretion of the attending physician, who honestly believes that his patient, afflicted with some mental malady or disorder and its attending physical consequences, deems it advisable to prescribe for his patient a course of treatment involving moral turpitude, conflicting with the accepted conventions of the community. Can the physician be heard to say, under those circumstances, that the accepted conventions of the community, interfering with his discretion in treating his patient, should be subservient to his will? The answer is apparent.

We therefore respectfully submit that the contention in behalf of the medicinal use of whiskey rather places the plaintiff in error in a very anomalous position.

III.

The Ordinance, Though Certain Portions of It Are Inoperative, Is Essentially a Prohibitory Ordinance.

The ordinance in question is set forth in full in the transcript of the record at page 33 *et seq.* The court will see at a glance that this is a prohibitory and not a license ordinance. It

prohibits the sale of distilled alcoholic liquors and makes it unlawful to conduct any saloon, bar-room, or other liquor establishment, or to sell or give away liquor, with certain exceptions. Sections 2 and 5, with their exceptions, are the provisions applicable to the case at bar, and they are as follows:

> "Sec. 2. It shall be unlawful to sell, serve or give away any alcoholic liquors within the city of Los Angeles, except as hereinafter provided.
>
> "Sec. 5. Nothing in the preceding sections of this ordinance shall be construed as rendering unlawful:
>
> "(c) The filling, only at pharmacies on the date of issuance, but not the refilling, of prescriptions calling for not to exceed eight ounces of alcoholic liquor each."

This is one of several exceptions. Exceptions are also contained in section 5 and numbered (a) to (g), both inclusive. In a word, this is an ordinance prohibiting the use of alcoholic liquors with certain exceptions. It is not an ordinance permitting the use of alcoholic liquors or licensing anybody to use them, but simply providing regulations under which, if people use them, they may proceed.

The exceptions are set off separately by paragraphs and none is dependent upon any other. The first exception under (a) relates to the service of alcoholic liquors in private homes to

members of the family or guests. The second one, under (d), relates to the sale of alcohol wines for sacramental purposes. The fourth one , under (d), relates to the sale of alcohol for scientific or other purposes. Any one of these can be eliminated and not affect the others. The elimination by the Eighteenth Amendment of the manufacture, sale or giving away of alcoholic liquors eliminated certain portions of this ordinance, but it did not necessarily affect the other portions. The provisions of the ordinance are not so closely tied together that the one can be said to depend upon another, and be repealed by the supreme law ratified by the people of various states.

It cannot be claimed either that the people had any other end in view when they passed this ordinance. Certainly those who are promoting prohibition by endeavoring to get more stringent legislation in Los Angeles, had in view the ultimate purpose of effecting state and national prohibition. The court will take notice of the agitation that has been going on for fifty years, culminating finally in the supreme effort which placed the Eighteenth Amendment in the Constitution of the United States, and the passage of the Gandier ordinance is so recent that unquestionably we may claim with good reason that its supporters had in view the ultimate

prohibition of the liquor traffic. That the people had it in view when voting upon this question, supporters as well as opponents, is perfectly apparent from the ordinance itself; for section 12 provides as follows:

> "In case any section or sections, or part of any section, of this ordinance shall be found to be unconstitutional, or invalid, the remainder of the ordinance shall not thereby be invalidated but shall remain in full force and effect."

The form of the provision using the words "shall be found to be" indicates that if any court at any future time, by reason of any law or adoption of any amendment, shall find any portion of this ordinance invalid, the remainder shall stand as the expression of the will of the people of the city of Los Angeles.

A similar provision has been placed in various statutes passed by the legislators of this state in times past, and it is used commonly in the passage of ordinances now in various cities. Without it we think that the provisions of the ordinance are so separable that they would stand anyway, but if the intent of the people is to be regarded as of controlling importance, then the intent is there expressed.

In addition to the well considered opinion of the District Court of Appeal in this case, we may further cite as the law of the state of

2
3

California upon similar conditions, the following:

In re Pappas, 57 Cal. App. 432 and 438;
In re Tosello, 57 Cal. App. 509.

The title of the ordinance, as heretofore set out, is conclusive, no doubt, of the fact that it was the intention of the electors of the city of Los Angeles that this ordinance shall be for all intents and purposes a prohibitive ordinance.

IV.

The Said City Ordinance Is Not Invalid Because Certain Portions Thereof Penalize the Sale of Alcoholic Liquors Without a License.

Before national prohibition was adopted, almost all of the states of the country had upon their statute books laws regulating the liquor traffic. Subsequent to the adoption of federal prohibition, in certain instances there was seeming conflict between federal legislation and the various state laws. This conflict resulted because state laws pertaining to prohibition contained provisions relating to the licensing of the liquor traffic. It was held by various courts of this country that when such conflict became apparent, only such portion of the state law was invalidated as licensed and permitted the use of alcoholic liquor.

It did not affect laws, or portions thereof, which tended to accomplish the objects sought by the federal legislation in a more drastic manner. The courts invariably held that state laws or city ordinances were not invalidated because certain portions thereof provided for the licensing of the liquor traffic. While that portion of the law licensing the liquor traffic is inoperative and ineffective, the remaining portion still subsists. The United States Supreme Court, considering the same situation, in Vigliotti v. Commonwealth, 258 U. S. 403, says:

> "The Brooks law, as construed by the courts of the state, prohibits every sale of spirituous liquor without a license, excepting only such sales as are made by druggists; and these are forbidden to sell intoxicating liquors except on prescription of a regular physician. The law applies however small the percentage of alcohol and although the liquor is not intoxicating. It applies to liquors sold solely for industrial uses. It does not purport to confer upon anyone anywhere the right to a license, nor does it authorize the sale of liquor in any city or county having a special prohibitory law. It merely grants to the appropriate officials, where such authority exists, discretion to give or to withhold the license under the conditions prescribed. In case of an indictment for selling without a license, a sale is presumed to be unlawful and the burden is on the defendant to show the authority on which he acted. It is thus primarily a prohibitory law; and its prohibitory features are not so dependent

upon those respecting license as to be swept away by the Eighteenth Amendment and the Volstead act."

We refer this court to the following decisions bearing on the same point:

Ex parte Pappas (Cal.), 207 Pac. 483;
Commonwealth v. Nickerson, 236 Mass. 281, 128 N. E. 272;
Ex parte Finnegan, 270 Federal 665;
State v. Craft, 246 S. W., 930;
People v. Velarde (Cal.), 188 Pac. 59;
People v. Tomasovich (Cal.), 206 Pac. 119.

By weight of authority the law seems to be settled that a state law or ordinance is not invalid because certain portions thereof penalize the sale of alcoholic liquor without a license so long as the remaining portions will help to carry out effectively the provisions of the 18th amendment.

V.

The City, in the Exercise of Its Police Power, Has the Inherent Right to Prohibit the Use of Intoxicating Beverages as Medicines, Even Though the Said Beverages Might Not Only Be Beneficial but Even Sometimes Necessary.

At the hazard of stressing, or perhaps overstraining to a point of extravagance, the im-

portance of the decision of the court below, we respectfully submit that the respondent is constrained, by the very forceful reasoning therein contained, to direct this court's attention to the transcript of record of the plaintiff in error, beginning on page 98, folio 293, to page 112, folio 334, thereof. The extract here referred to in no small measure indicates the consensus of the authorities on this subject.

That the use of such liquors, in beverage form, for medicinal purposes, can be entirely prohibited by the state, is shown by the following cases:

In State v. Brothers, 175 N. W. 685, the court holds that the state has an unqualified power to restrict to a greater extent the traffic in alcoholic liquors as a beverage than the federal legislation already provided on the same point:

> "As said in State v. Hosmer, 175 N. W. 683, decided herewith, it is within the police power of the state to prohibit *all traffic in intoxicating liquors*, including the manufacture, sale, transportation and possession thereof. In order to make the enforcement of these prohibitions effective, the state may prohibit traffic in beverages near to intoxicants, even though not intoxicating in themselves."

Further the court holds:

> "Its interpretation and its enforcement are not circumscribed by the provision of the act of Congress. It may be broader in its prohibitions. This is not a case where Congress has usurped the whole field. We recently held that the act of Congress for the suppression of the traffic in narcotics might be supplemented by state legislation and that the state legislation might be more rigorous in its terms than the federal act."

> "The legislation has power to prohibit traffic in liquor containing one-half per cent alcohol, whether the proof shows that it is intoxicating or not."

The question whether the traffic in alcoholic liquors, in beverage form, endangers public health, morals and safety, is one exclusively of fact to be determined by the community seeking to accomplish absolute prohibition as an objective.

It is equally true, it might be urged, that the state has an inherent right, upon deciding the fact that the dispensing of whiskey in beverage form is harmful notwithstanding the contentions of a number of physicians to the contrary, to determine, as a matter of public policy, to what extent it should be regulated or even entirely suppressed. It is not admitted for one moment that the dispensing of whiskey as a beverage is in any way beneficial, but in any

event, as disclosed by the instant case, a sharp conflict as to its beneficial character exists. Under those circumstances the community, being confronted by conflicting opinions, thwarting, as it were, its objective of prohibition, had a basic right to decide for itself by adopting this ordinance, that medicinal whiskey is more harmful than beneficial, and as a result further regulation is necessary in order to protect and secure the welfare of the community.

In Powell v. Pennsylvania, 127 U. S. 678, the Supreme Court of the United States discusses the statute, the purpose of which was to absolutely prohibit the use of oleomargarine, though it was conceded that oleaginous substance is not deleterious or injurious but, quite on the contrary, useful. The court says:

> "But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. Mugler v. Kansas, 123 U. S. 623, 631. *The court is unable to affirm that this legislation has no real or substantial relation to such objects.*"

The court further says:

"Whether the manufacture of oleomargarine, * * * or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact, and of public policy, which belong to the legislative department to determine. *And it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law. The legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government had, in the employment of means to that end, is very large.* * * * The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, * * * of oleaginous substance * * * will promote the public health and prevent frauds in the sale of such articles. If all that can be

> said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government." (Italics ours.)

Also, the court says,

> "The objection that the statute is repugnant to the clause of the Fourteenth Amendment forbidding the denial by the state to any person within its jurisdiction of the equal protection of the laws, is untenable. The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions: thus recognizing and preserving the principle of equality among those engaged in the same business. Barbier v. Connelly, 113 U. S. 27; Soon Hing v. Crowley, 113 U. S. 703; Missouri Pacific Railway Co. v. Humes, 115 U. S. 512, 519."

It would indeed be highly presumptuous to assume that the language thus used in Powell v. Pennsylvania, *supra*, is so narrow, so shallow, and so extremely limited, that its application is strictly confined to the specific instance therein treated. The principle uttered by the Supreme Court is a resplendent ray from a beacon light, cast upon the entire field of legis-

lation in the exercise of police power, and it applies to the case at bar with equal effectiveness.

The North Carolina supreme court, in State v. Barksdale, 107 S. E. 505, in discussing a conflict between the National Prohibition Law and the state statute, pertaining to flavoring extracts, it was contended that because of this conflict federal legislation had the effect of invalidating the state law on the same subject. It seems the unmistakable conclusion of the court in that case that the state can by all means have a more drastic law for the enforcement of alcoholic liquors. The court, in discussing the situation, says:

> "As to the permit, it has been held by our highest court that the Eighteenth Amendment to the United States Constitution and the valid provisions of the Volstead act in furtherance of the same are in case of conflict the controlling law on this subject. Both the one and the other, however, inhibit the manufacture, sale and transportation of intoxicating liquors only for beverage purposes, and, while no state can enact any statute or enforce any regulation in contravention of the declared purpose, there is nothing in either to inhibit a state from passing more stringent regulations in reference to the manufacture and sale of intoxicating liquors, and this permit therefore issued by the federal prohibition officer, is not conclusive or necessarily a

> protection (State v. Fore, 180 N. C. 744, 105 S. E. 334; Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. 486, 64 L. Ed. 946), but both of these items of evidence are competent as tending to show good faith on the part of the defendant, and that these preparations are in fact what they profess to be, flavoring extracts. * * * *And in any event our statute, more stringent in this respect than the Volstead act, contains an absolute prohibition of the sale of extracts for beverage purposes having in them any alcohol whatever."* (Italics ours.)

We do not wish to be understood in any way that we admit any conflict between the Gandier ordinance and the Volstead Act. Quite to the contrary, we insist, with the permission of the court, that the provisions of both are wholly in harmony with each other. It must be said in support of the ordinance, that it is more stringent, more far-reaching, and that it more effectively brings about the purpose sought to be accomplished by the Eighteenth Amendment. At any rate, the ordinance expresses an unmistakable and determined intention on the part of the people of the city of Los Angeles to rectify a social and physical evil through the instrumentality of this ordinance.

In the case of Rippey v. Texas, 193 U. S. 504, according to the brief for plaintiff in error

therein, the legislature of the state of Texas was deprived of all power to prohibit the sale of intoxicants in any locality, but such power was vested exclusively in the citizenship of each particular locality or subdivision of the state to determine whether or not the sale of intoxicants, except for mechanical or sacramental purposes, should be prohibted in this particular locality (medicinal whiskey entirely omitted). Under this provision a certain locality in Texas had by majority vote prohibited the sale of intoxicants, except for mechanical or sacramental purposes. Plaintiff in error was convicted of selling intoxicating liquors contrary to vote of his precinct prohibiting such sale. Mr. Justice Holmes, in delivering the opinion of the court, said:

> "The question for us is whether, if the state constitution undertakes to authorize such a law, it encounters the Constitution of the United States. It is a question of power of the state as a whole. Missouri v. Dochery, 191 U. S. 165, 171. But the state has power to prohibit the sale of intoxicating *liquors altogether*, if it sees fit, Mugler v. Kansas, 123 U. S. 623, and that being so, it has power to *prohibit it conditionally. * * * The state has absolute power over the subject.* It does not abridge that power by adopting the form of reference to a local vote. *It may favor prohibition to just such a degree as it chooses, and to that end may let in a local*

vote upon the subject as much or as little as it may please." (Italics ours.)

A very pertinent case that sheds a great light on the instant matter, is Woods v. the City of Seattle, 270 Fed. 315. Quite a similar question was presented. In it the so-called "bone dry law" of Washington was attacked upon the ground that it conflicted with the federal prohibition law in the use and disposition of Jamaica ginger. It was contended that the National Prohibition Law overrides the police power of the state. The court, however, says:

> "The police power of the state, therefore, is paramount where it does not authorize what the national act prohibits, and through its inherent reserve power it has the right to legislate in such manner. The state may prohibit, but it may not authorize."

The court also says:

> "The prohibiting by national legislation of traffic in liquor with more than one-half of one per centum of alcohol by volume does not prevent the state, or the city within the granted police power, to decide upon measures that are needful for the protection of its people by prohibiting possession or delivery of intoxicants fit for beverages purposes, under the guise of innocent preparations not within the National Prohibition Act."

We are actuated by a dual purpose in urging upon this Honorable Court consideration of case of Woods v. Seattle, *supra:*

First: The relative strength of local prohibition laws compared with federal legislation on the same subject;

Second: That the state has the right to suppress proprietary medicines, such as Jamaica ginger, which, no doubt, has been recognized as a household remedy for a considerable time.

A case that is almost on all fours with the one under consideration is dealt with by the Supreme Court of Alabama, in McAllister v. State, 47 So. 161. The statute there involved is one that prohibits the prescribing of alcoholic liquors of more than one-fourth of a pint, in quantity, and further prohibits the prescription of alcohol on Sundays, and contains various other inhibitions. The court, in sustaining the said law, says:

> "Nor is the act subject to the objection that it interferes with the personal liberty of the physician. It embraced all of his class, and had no personal bearing on him, more than on any other physician. It was competent for the legislature in the interest of regulating and prohibiting the liquor traffic, to pass the bill."

In State v. Andrews, 188 Ia. 626, an injunction was granted restraining the defendant, a

druggist, from selling a proprietary medicine, known as "Harlax Stomach and Liver Regulator". The injunction was granted over the protest of the defendant that the said proprietary medicine was sold for medicinal purposes and notwithstanding the fact that a reputable physician testified that the proprietary medicine had medicinal properties and is of therapeutic value.

In Ruppert v. Caffey, 251 U. S. 264, decided in 1919 by the Supreme Court of the United States, the principal question involved is the right of Congress, under the so-called "War Prohibition Act," to prohibit the sale of malt liquors whether the same are intoxicating or not. The case, and the very valuable notes thereto, are an exhaustive and comprehensive treatise of the entire question. Justice Brandeis, in rendering the decision, said:

> "If the war power of Congress to effectively prohibit the manufacture and sale of intoxicating liquors in order to promote the nation's efficiency in men, munitions and supplies is as full and complete as the police power of the states to effectively enforce such prohibition in order to promote the health, safety, and morals of the community, it is clear that this provision of the Volstead act is valid, and has rendered immaterial the question whether plaintiff's beer is intoxicating. For the legislation and decisions of the highest courts of

> nearly all the states establish that it is deemed impossible to effectively enforce either prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors, if liability or inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor made or sold as a beverage is intoxicating."

The same reasoning applies to the instant case, because the city of Los Angeles realized that it was "impossible to effectively enforce prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors if liability or inclusion within the law is made to depend upon the issuable fact whether" medicinal whiskey has any therapeutic value.

The court further points out, in discussing the police power:

> "The police power of a state over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors supported by a separate implied power to prohibit kindred non-intoxicating liquors so far as necessary to make the prohibition of intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intoxicating liquors."

The above extract is an unqualified gauge by which can be measured the right of the state to suppress the traffic in intoxicants.

The said case is also authority for the proposition that it is necessary to impinge upon the rights of its citizens to the extent of even depriving them of their property in order to carry out the purposes of government. The court in this regard says:

> "Hardship resulting from making an act take effect upon its passage is a frequent incident of permissible legislation; but whether it shall be imposed rests wholly in the discretion of the lawmaking body."

The case of The Purity Extract Company v. Lynch, 226 U. S. 192, we believe is of considerable importance and pertinently bears on the case at bar. The court says:

> "When a state exerting its recognized authority undertakes to express what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. * * * *It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants.* It prohibited, among other things, the sale of 'malt liquors'. In thus dealing with a class of beverages

> which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise. * * * *The state, within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved* power." (Italics ours.)

From this statement it will appear that the state might prohibit the use of alcoholic liquors even for beneficial purposes, if such a course were reasonably necessary to the effective enforcement of prohibition laws, and, it is further eminently within the power of the state to determine whether such a course was necessary, in view of the difficulties attending the effective administration of prohibition laws.

We beg leave, for the purpose of presenting the apparent and appropriate analogy that so forcefully presents itself between the case at bar

and The Purity Extract Company v. Lynch, *supra*, to just revise in one particular the language of the last statement from the extract last above quoted:

> "The state, within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of *medicinal whiskey (ours)*, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power."

We submit that this humble effort to revise is for the one purpose of presenting to this court that the conclusion reached by reason of the revision is rational and warrantable under the circumstances. The statement as revised, we believe, is plausible and might be decisive of the question here involved.

Falstaff Corporation v. Allen, 278 Fed 643, holds that Congress has a right to regulate alcoholic prescriptions. The action in that case was for an injunction to prevent the enforcement by defendants, who were prohibition officers, of so much of the amendment of November 23, 1921, to the Volstead act, as provides:

> "That only spirituous and vinous liquors may be prescribed for medicinal purposes,

> and all permits to prescribe and prescriptions for any other liquor shall be void."

The question presented in the language of the court is:

> "Did the language of the Eighteenth Amendment confer on Congress authority to forbid the physicians, who were citizens of the several states, from prescribing intoxicating malt liquor as a medicine?"

The court, answering the question thus propounded, says:

> "Since the end sought, as Congress has thus solemnly determined, is the prohibition of intoxicating liquors as a beverage, no one, I apprehend, can well contend that the amendment of November 23, 1921, is not appropriate legislation to the end sought. *Color is lent to appropriateness of the restriction here complained of by the fact that a large number of the states of the Union have deemed it absolutely necessary to pass laws which prohibit the prescribing for medicinal purpose of any intoxicating liquors whatever, save alcohol alone.* See Rupert v. Caffey, 251 U. S. Loc. Cit. 283, 40 Sup. Ct. 141, 64 L. Ed. 260 *et seq. Those statutes thus restricting the privileges of physicians have been upheld in every case, so far as my examination of the holdings extends; indeed, on principle, no legal reason exists why any such statute of a state could or should be held invalid; for it is settled by a long and uninterrupted line of cases, that the states may regulate the mode and manner, and the circumstances, under which the liquor traf-*

fic may be conducted, and may hedge about the right to pursue it with such restrictions, conditions and limitations as the Legislature may deem proper, or they may even prohibit it entirely." (Italics ours.)

While it does not clearly appear that a great deal of stress is placed upon the question of medicinal value of intoxicants, it seems that the principle enunciated under Falstaff Corporation v. Allen, *supra,* is very similar to the one contended for by the respondent, and it must be inferred that since the federal government by appropriate legislation can restrict and place limitations on prescriptions of intoxicating liquors, it would follow with as much force that the state or municipality possessed with police power can do the same.

In the case of Piel Bros. v. Day, 278 Fed. 223, the court, dealing with intoxicants used for medicinal purposes, we suggest, may have no small value in determining the question here involved. Virtually the same issues were raised in the said case as in the instant matter, and the decision of the court would have application to the matters here considered. We therefore invite serious consideration to the reasoning of the court, as a basis for the finding that the government has a right to restrict and limit the discretion of physicians in prescribing intoxicants for medicinal purposes. The court in that case says:

"Thus it would seem that some states have considered it essential to the enforcement of their respective liquor laws to forbid absolutely the use of certain liquors for any purposes. Before the Willis-Campbell Bill was enacted Congress conducted a careful investigation into the medicinal qualities of beer. Little was then said in its favor as a therapeutic agent. It may be conceded that it has always been considered as a beverage, rather than a medicine, if any importance attaches to the amount consumed as a beverage as distinguished from the amount required by those who sought its medicinal qualities because of the advice of a physician, or of one who benefited from its use. *It would therefore appear that Congress deemed this legislation imperative to accomplish effective enforcement of the amendment,* and at the same time was satisfied that there is little or no value in beer either as a therapeutic agent or as a galactagogue. The latter is disputed—bitterly disputed—by the complainant, which on the hearing of the motion filed numerous affidavits by physicians that beer has value as a medicine and is frequently prescribed under various conditions. *If, having given due consideration to claims of such character, Congress has considered the legislation necessary to the effective enforcement of the amendment, it cannot be said that it has abused its power."* (Italics ours.)

The above case was appealed to the Circuit Court of Appeals, Second Circuit, and the order of the lower court denying the temporary in-

junction was affirmed in a memorandum opinion, May 15, 1922, and reported in 281 Fed. 1022.

We here submit, in recapitulating the various authorities upon this point, that the following principles are deducible therefrom:

First: Upon the basis of the principle laid down in Powell v. Penn, *supra,* that such legislation, or substantially similar legislation, relating to medicinal whiskey, has in effect a real and substantial relation to the object it seeks to accomplish, and in this case the suppression of the traffic in intoxicants;

Second: Upon the principle laid down in Purity Extract Company v. Lynch, *supra,* that it is competent for the Legislature to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants;

Third: Upon the principle laid down in Piel Bros. v. Day, *supra,* that the legislative body, having given due consideration to the medicinal value of intoxicants, and considered such legislation necessary to the effective enforcement of prohibition, it cannot be said that the legislative body has abused its police power.

Upon consideration of these principles in the light of each other, it must logically follow that the city of Los Angeles, possessed with the same

police power as the federal government itself, at least to regulate medicinal whiskey has through said ordinance, properly exercised its police power.

In conclusion, we wish to say that we join with the court in Falstaff Corporation v. Allen, *supra,* in saying:

> "Color is lent to the appropriateness of the restriction here complained of by the fact that a large number of the states of the Union have deemed it absolutely necessary to pass laws which prohibit the prescribing for medicinal purposes of any intoxicating liquors whatever, save alcohol alone. (Quoting authorities.) Those statutes thus restricting the privileges of physicians have been upheld in every case, so far as my examination of the holdings extends; indeed, on principle, no legal reason exists why any such statute of a state could or should be held invalid, for it is settled by a long and uninterrupted line of cases that the states may regulate the mode and manner, and the circumstances, under which the liquor traffic may be conducted, and may hedge about the right to pursue it with such restrictions, conditions and limitations as the Legislature may deem proper, or they may even prohibit it entirely."

VI.

The Right of a Municipality to Regulate the Prescription of Alcoholic Liquor, Founded Upon an Inherent Police Power, Does Not Contravene the Provisions of the Fourteenth Amendment of the Constitution of the United States. The Right of a City to Pass an Ordinance Which, in Effect, Regulates the Prescription of Alcoholic Liquor, in Beverage Form, for Medicinal Purposes, Does Not Deprive the Plaintiff in Error of Those Constitutional Guaranties Contained in the Fourteenth Amendment.

The police power, the dynamic element of government, it might be said, pre-exists government itself. The police power is not susceptible of any exact definition. We have ascertained through the ages of organized government only the actions and reactions of this power, and deduced from its manifestations that it is indispensable to wholesome and progressive government.

Police power is the adhesive chemical element in government that solidifies, strengthens and preserves it. It existed during the period of critical suspense when this country was wavering in the shadows, before the adoption of the Constitution.

The merging of the states, under a unified and accepted Constitution, did not detract from the vitality and vigor of the primary essence of government manifested by the police power of each state, but, on the contrary, it fundamentally, by a process of concentration, developed the possibilities thus existing in the several states to a degree which, no doubt, is conducive to the manifold and magnificent objectives expressed in the Constitution. The Federal Constitution functions in the manner of a limitation valve, equalizing and coordinating the combined potency of all the states.

At the period of the formation of the federal government, each state reserved to itself the right of the free exercise of its police power. As a matter of fact, the police power of each state, constituting the vital organ thereof, was not then, and is not now, susceptible of any division or detraction, but to increase its efficiency the federal government has merely placed certain limitations so that the organism of the state could function more effectively.

It is absolutely necessary to the welfare of the state, in a positive way, to resist unwholesome, unsanitary and objectionable growths that result from ever-changing conditions, and any detraction or division in any degree would indeed impair the health, safety and welfare of each separate community.

Intoxicating liquor, with its ever-attending consequences, presented a menacing problem very early in the history of government.

It would be idle to pursue to any great length the discussion that the state has a right, by reason of its police power, to suppress the traffic in intoxicants. It would be of no greater value to pursue and discuss the reasons therefor, the matter having been before this august body a number of times.

It is well settled that the state has a right to suppress the use of alcohol in beverage form. Perhaps there is no other legal precedent more thoroughly discussed than the principle that the state has the right to control, regulate and prohibit, even to the point of absolute prohibition, the traffic in liquor, and that right, unreservedly inherent in the state, falls within the scope of the legitimate legislative exercise of the police power of the state.

The liquor traffic coming, as it does, within the proper province of the police power of the state, operating uniformly, must of necessity cause the deprivation of personal rights, and also of property rights. In order to promote the public welfare, morals and safety, the deprivation of property rights, under those circumstances, is not a contravention of the Constitution of the United States. Constitutional liberty does not

mean absolute freedom from restraint. The need of organized society impels, by reason of its very existence, the imposition of burdens and the exaction of deprivations in order to give sustenance to government, so it might have strength to protect the individual. And to accomplish this purpose completely the police power may infringe upon the constitutional guarantees provided in the Fourteenth Amendment, as clearly pointed out in Lawton v. Steele, 152 U. S. 133, in which the court says:

> "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual

drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. *Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.* Barbier v. Connolly, 113 U. S. 27; Kidd v. Pearson, 128 U. S. 1. To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." (Italics ours.)

There is little room for speculation, in view of the foregoing, when an entire community, a political entity, vested with police power, finds that there exists abuses, evasions and subterfuges of every law intending the suppression of the traffic in alcoholic liquor in beverage form. These abuses and evasions of the law, founded upon experience, grow out of and result from the prescribing and dispensing of alcoholic liquor in beverage form for medicinal purposes.

It cannot be disputed that the aggregate discretion of the entire community, expressed

through its franchise at the polls, is superior, and even paramount, to the discretion used by a physician in prescribing alcoholic liquor, in beverage form, who still adheres to the fast vanishing school that believes that alcoholic liquor as a beverage possesses a therapeutic value. That these abuses exist, every court of criminal jurisdiction has knowledge.

Druggists' Cases, 85 Tenn. 449, 458.

We need not go for specimens of the abuse of the use of medicinal whiskey outside of the instant matter. We believe the instant case fairly illustrates that phase of it. We are herewith setting out an exact statement of the testimony as given in the Police Court out of which this proceeding springs. The plaintiff in error Hixson has been convicted upon the following testimony:

Officer D. McD. Jones testified as follows:

"Q. You are a police officer of the city of Los Angeles?
A. I am, sir.
Q. Do you know the defendant, M. W. Hixson?
A. I do, sir.
Q. Did you see him somewhat prior to the 8th day of September of this year?
A. I did, sir.
Q. On what day did you see him?
A. On the 7th of September.
Q. And where did you see him?
A. 3700 West Washington street.

Q. And what kind of a place is that?
A. It is a drug store—pharmacy.
Q. What was he doing there at that time?
A. Waiting on the trade at the time I entered the place.
Q. What did you do at the time you went in there?
A. Offered him a prescription.
Q. Have you the prescription with you?
A. Offered him this prescription (witness exhibits an instrument).
Q. Where did you get this prescription?
A. From Doctor Morrison.
Q. You say you handed him this prescription?
A. I did.
Q. What did you say at the time?
A. I said I had a prescription for him.
Q. What did he say or do?
A. He wanted to know; he says: 'You want whiskey?' I says, 'Yes.' And he gave me this bottle of whiskey.
Q. Now, is this the bottle he gave you (exhibiting bottle)?
A. I paid him five dollars in money. He delivered me that in the presence of Mr. Dell, Officer Steckle and myself, and I handed him the money in their presence.
Q. In what quantity did you receive this; how much was it?
A. He informed me it was one pint."

We respectfully submit that the foregoing transaction, as disclosed by the evidence, does not involve any great problem of therapeutics, or any great experiment in pathological research by and through which the community at large could emerge free from all ills and afflictions.

While strictly speaking the above extract of testimony is not included in the printed record before this court, it is nevertheless an integral part of this case. We further wish to urge that the incident as related by the officer is not a single isolated case, remotely removed and standing alone. We are indeed very mindful, engaged as we are in law enforcement, that the instances are indeed too frequent.

It must be pointed out, as a matter of common knowledge, that the issue here involved is really of very little interest and much less consequence to the plaintiff in error. To the legitimate druggist it makes very little difference whether he sells eight ounce bottles or sixteen ounce bottles. What really matters to the druggist is the volume of business, gross receipts and net profits. The evolution of the drug business is as astounding as the growth of any other business of modern times, yet we are fortunate indeed that there is still in our midst a generation that can recall that druggists not so very long ago were a distinctive type of chemists, healers, a comfort and a God-send in cases of emergency, and that drug stores were veritable pharmacies and apothecaries. Nowadays a druggist is rather a man of great business acumen, and a drug store is an elaborate department store. The keen business ability of the druggist made him realize very early that

the dispensing of alcoholic liquor in beverage form was fraught with danger and great difficulty, hence unprofitable, and, as a result, comparatively few in the drug stores are dispensing alcoholic liquor in beverage form for medicinal purposes upon prescription. But there are some who sell unlawfully and others who would like to have all bars down so that they may sell. If plaintiff in error wins this case, the result will be a practical nullification of the 18th Amendment. Drug stores would become saloons in fact.

This writ of error was not instituted by a patient and the interest of the physician, in any event, is not that of a personal party to these proceedings. (Marshall v. Dye, 231 U. S. 250; Clark v. Kansas City, 176 U. S. 114; Tyler v. Judges, 179 U. S. 405; Smith v. Indiana, 191 U. S. 138; Stewart v. Kansas City, 239 U. S. 14; McCandless v. Platt, 211 U. S. 437.) Besides the interest of the physician is only a passive one, at best. The word "passive" is used advisedly, because, as already noticed, the use of whiskey is of doubted therapeutic value.

Query: Would it be, from the premises, extremely visionary to conclude that these proceedings are motivated by strong liquor interests for the express purpose and intention of making inroads and opening up avenues to undermine the suppression of intoxicants?

It must be distinctly borne in mind that the ordinance does not prohibit alcohol as a constituent ingredient in the compounding of medicines. The ordinance only relates to the prescription of alcohol in beverage form for medicinal purposes. The unmistakable objection of the People of the City of Los Angeles is to the dispensing of one prescription, at any one place, at any one time, of more than 8 oz. of whiskey.

Reverting to the proposition that the state has not diminished its police power, though it has created a concurrent force in the Federal Government by the Eighteenth Amendment, we cite the following authorities as sustaining this position.

Chief Justice Taney, in the Licenses Cases (5 How. 504, 583), in attempting to define the police power, says:

> "But what are the police powers of a state? They are nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion."

In matters of this kind the state has reserved the right to itself to regulate all the powers that it has not delegated to the Federal Government. The court, in Collector v. Day (11 Wall. 113, 124), said:

> "It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the Government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments."

The power of the states to regulate matters of internal police within their limits applies not only to the health, morals and safety of the public, but also to whatever promotes the public peace, comfort and convenience.

Beer Co. v. Massachusetts, 97 U. S. 25;
Patterson v. Kentucky, 97 U. S. 501;
Mugler v. Kansas, 123 U. S. 623;
Lake Shore etc. R. Co. v. Ohio, 173 U. S. 285;
Bacon v. Walker, 204 U. S. 311;
Keller v. U. S., 213 U. S. 138;
Missouri etc. R. Co. v. Haber, 169 U. S. 613;
Sioux Remedy Co. v. Cope, 235 U. S. 197;

McLean v. Denver etc. R. Co., 203 U. S. 38;

Houston etc. R. Co. v. Mayes, 201 U. S. 321;

Bowman v. Chicago etc. R. Co., 125 U. S. 465;

Robbins v. Shelby County, 120 U. S. 489;

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

The police power, inherent in the state and its proper political subdivisions, stands pre-eminently unaffected by the Eighteenth Amendment. The instrumentality of the Eighteenth Amendment as a means for the suppression of the traffic of alcoholic liquor was intended in nowise to affect the maintained integrity and sovereignty of the state. The state invested with police power is entirely separate and apart and independent of the Federal Government. We believe that this contention is supported by U. S. v. Lanza, 260 U. S. 377. Mr. Justice Taft, in rendering this decision for the court, says:

> "Each state, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. * * * They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of *independent legislative action in district jurisdictions.* * * * Save for some restrictions arising out of the Federal Constitu-

tion, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, state power would be excluded. *In effect the second section of the Eighteenth Amendment put an end to restrictions upon the state's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits.* To be sure, the first section of the amendment took from the states all power to authorize acts falling within its prohibition, but did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this amendment, but from power originally belonging to the state, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the *ratio decidendi* of our decision in Vigliotti v. Pennsylvania, 258 U. S. 403.

"We have here two sovereignties deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."

It is equally true, then, that the state is free to determine for itself in the field of liquor prohibition to what extent whiskey could be used for medicinal purposes, or the extent to which it could be regulated, or even entirely suppressed. The evident construction placed upon the Eighteenth Amendment seems infallibly to be, as shown by the above extracts, a matter within the sound discretion of the state, gauged, however, by the Eighteenth Amendment and the Volstead Act as limitations to be decided by the proper political subdivision as to the degree of absolute prohibition.

The case of State v. Moore, 212 Pac. 349, was predicated on the law of the state of Idaho prohibiting the possession of intoxicating liquor in one's private dwelling, as well as elsewhere; also prohibiting the manufacture, sale and transportion for sale of intoxicating liquor for beverage purposes. The facts in this case, as stipulated by counsel, were that the defendant did have in his possession said liquor, in his own residence, for his personal use and *bona fide* guests, and which said possession was permitted by and lawful under the provision of section 33 of the Volstead Act. The court in discussing the situation says:

> "At the outset it will be well to have in mind that Congress has only such powers as have been granted by the Constitution of the United States. More than 100 years

ago, in the case of Martin v. Hunter's Lessee, 1 Wheat. 304, 324, 4 L. Ed. 97, 102, the Supreme Court of the United States, in an opinion by Justice Story, concurred in by Chief Justice Marshall, said: 'The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The Constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

" 'These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the Constitution, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

" 'The government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.'

"Before the adoption of said amendment as a part of the Constitution of the United States, the sole power to deal with intrastate prohibition of the manufacture and sale of intoxicating liquors was vested in the states. Whatever limited power Congress had to deal with the question was incidental to the exercise of powers conferred upon it by the Constitution of the United States (Citing cases.) In other words, the police power which was exercised by the states in dealing with intoxicating liquors was not shared by Congress. In the exercise of this plenary power the states could permit the manufacture and sale of intoxicating liquor without any restrictions whatever, or they could license such manufacture and sale, *or they could absolutely prohibit it.* * * * (Italics ours.)

"It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested, * * *

"We agree that in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together; and, also, that the act of Congress should have been passed in the exercise of a clear power under the Constitution. * * *

"It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, *a state has power absolutely to prohibit manufacture, gift, purchase, sale or transportation of intoxicating liquors within its borders without violating the guaranties of the Fourteenth Amendment.* (Citing cases.)

"As the state has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective (citing cases), *and, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.*"

House v. Mayes, 219 U. S. 270.

The constitutionality of a Missouri statute, which sought to prevent fraud in the purchase and sale of grain and other commodities, was in question. Regarding the police power of the state, the court made the following statement on page 282:

> "* * * a state of the Union may exercise all such governmental authority as is consistent with its own constitution, and not in conflict with the Federal Constitution, that such a power in the state, generally referred to as its police power, is not granted by or derived from the Federal Constitution, but exists independently of it, by reason of its never having been surrendered by the state to the General Government; *that among the powers of the state not surrendered—which power therefore remains with the state—is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good; and that it is with the state to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own constitution or the Constitution of the United States.* The cases which sanction these principles are numerous, are well known to the profession, and need not be here cited."

The case of Commonwealth v. Nickerson, 128 N. E. 273, points out that the state has concurrent jurisdiction, and that the use thereof as an appropriate remedy to carry into effect prohibition is that of an auxiliary to existing police power, which is reserved by the state for the purpose of accomplishing prohibition. The court in that case says:

> *"The power thus reserved to the states must be put forth in aid of the enforcement and not for obstruction of the dominant purpose of the amendment.* It must not be in direct conflict with the act of Congress in the same field. *Subject to these limitations growing out of the nature of our dual system of government, the power of the states is constant, vital, effective and susceptible of continuous exercise."* (Italics ours.)

The opinion in case of Motlow v. State, 125 Tenn. 547, is a learned treatise upon the subject here under discussion. It treats the various angles here involved most exhaustively. It is truly in the nature of a compendium on the subject of police power and its relation to the Constitution.

We beg to submit the following extracts which stand out pre-eminently for the consideration of the court:

> "Grant that whiskey, brandy and the like are useful liquors for medical and other non-beverage purposes. It is also true that the evil which flows from their use as a beverage overwhelmingly outweighs the good service they perform as medical and other non-beverage agents. * * * The fallacy of the whole argument is in the assumption that, if an article is useful for any purpose, it cannot be wholly forbidden, no matter how greatly its evil capabilities and actual uses overbalance the good purposes it serves. The Legislature is the judge of the times and occasions when pub-

lic danger threatens, and it is for the courts to apply the test of the constitutional limitations and restrictions, and these must be applied with a careful and discriminating judgment. * * * Still stronger is the case of Cureton v. State, 135 Ga. 660, 70 S. E. 332. The syllabus of the case fully expresses the substance of it, and is as follows: '"The act approved August 6, 1907 (Acts of 1907, p. 81), commonly known as the 'prohibition law,' is not violative of article 1, section 1, par. 3, of the Constitution of this state, which provides that no one shall be deprived of life, liberty, or property, except by due process of law, on the ground that it prohibits the manufacture of alcohol for any and every purpose, including its use for medicinal, scientific and mechanical purposes, and its use in the arts, as well as other uses than as a beverage. Nor does the act offend this constitutional provision, because of its applicability to a person who owned and operated a distillery at the time of its passage. Nor is such an act violative of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of laws. The act mentioned above does not violate article 1, section 1, par. 2 of the Constitution of this state, which declares that protection of person and property is the paramount duty of government, and shall be impartial and complete."

While it might justify to treat separately every case cited by the court at great length, we are impressed that it would not make this brief any more imposing or impressive. Nevertheless, the great volume of authorities contained in the case establish, in no small measure, the proposition contended for by this respondent.

It is significant to note that Motlow v. State, *supra*, has been appealed to the Supreme Court of the United States and is reported as 239 U. S. 653, with this simple remark appended thereto: "Dismissed with costs on motion of counsel for plaintiff in error."

The Fourteenth Amendment to the Constitution of the United States must be answered in the light of the Eighteenth Amendment.

First: If it is conceded that the Eighteenth Amendment is a restriction, or a limitation of privilege, or, further, that if the Eighteenth Amendment is designed to coordinate with the police power of the state for the purpose of accomplishing prohibition, then it must be conceded—

Second: That the Fourteenth Amendment is consistent with the police power of the Federal Government and it must then be concluded that the Fourteenth Amendment consistently coordinates with the police power of the state; and since it is consistent with the police power

of the state, as we believe is borne out by the authorities herein quoted, we are constrained to urge that it would be logical to conclude that the state, in pursuance of its purpose to accomplish prohibition by adopting the ordinance here in question, is not in conflict with the Fourteenth Amendment.

The contentions summarized herein contained, which we believe to be well founded in authority, are:

1. That the state or any of its political subdivisions is free to determine for itself, by reason of its vested police power, to what extent it shall regulate or even entirely suppress medicinal whiskey, and may enact appropriate legislation to effectively accomplish that purpose;

2. That such legislation, which is enacted for the purpose of carrying out more effectively the provisions of the Eighteenth Amendment, thereby guarding public morals, public health, and public safety, is devised as a means of protecting the welfare of the community and is the result of circumstances that make such legislation necessary.

3. It might be *apropos* to the subject matter here under discussion to call the court's attention to the fact that the Volstead law expressly declares that no "property rights" exist in intoxicants.

Therefore, we respectfully submit that, by reason of the contentions heretofore cited, this ordinance is not inconsistent with the provisions of the Fourteenth Amendment to the Constitution of the United States.

In Refutation.

There seem to be two cases that directly conflict with the respondent's contention. They are: United States v. Freund, in the Federal Court for the District of Montana, reported in 290 Fed. 411, and the case of Lambert v. Yellowley, in the Federal Court of New York, reported in 291 Fed. 640.

United States v. Freund, *supra,* is devoid of authority. The court therein discusses the situation at some length, but fails entirely to show any authority upon which he bases his decision. In the case of Lambert v. Yellowley, *supra,* Judge Knox in part of his decision says:

> "It is, however, argued that, irrespective of all that has been said, the cases of Purity Extract Co. v. Lynch and Ruppert v. Caffey, *supra,* make it necessary to dismiss the complaint. I freely admit those decisions give me pause."

Indeed, both the case of Purity Extract Co. v. Lynch and Ruppert v. Caffey, *supra,* might well give the honorable judge pause. In Lambert v. Yellowley, *supra,* the action was brought

in behalf of a physician, not on behalf of a druggist, as in the instant case.

The principles established by the cases of Purity Extract Co. v. Lynch and Ruppert v. Caffey, *supra*, so conflict with the decision rendered in Lambert v. Yellowley that the latter is without weight.

The evident object sought to be achieved by the city of Los Angeles, through this ordinance, is to eliminate and, if possible, entirely remove the menacing problem that results from the merchandising of whiskey under the guise of medicine.

We respectfully submit that since legislation providing for the prohibition of non-intoxicating beverage, harmless in its effects, innocent of any taint of alcohol (Purity Extract Co. v. Lynch, *supra*), and free from any liability that it might be injurious to the consumer, has been declared valid, and since legislation, having for its purpose the inhibition of articles of food for consumption, not only being wholesome, but even useful and economical (Powell v. State, *supra*), has been declared valid upon the theory that such legislation has a real and substantial relation to the objects sought to be accomplished, which is in one case the suppression of the traffic of intoxicants, and in the other the perpetration of fraud, surely the logical con-

clusion from these premises asserts itself that whiskey, the object most sought to be suppressed, fraught with danger, its history written by the disaster and destruction it has caused, and dubious as a medicinal agent, has a real and substantial relation to the objective of prohibition, and, upon this theory, medicinal whiskey can be further regulated, and even suppressed.

Nor can the respondent find any consolation in the contention of the plaintiff in error that if the druggist stoops to any subterfuge he might have his license revoked, or that the matter is further being regulated by the Federal Government. The plaintiff in error loses sight of the fact that the community at large suffers great detriment by the lack of regulation of medicinal liquors, and that conditions are not rectified by merely having a druggist's license revoked. The evil resulting from the indiscriminate sale of medicinal whiskey is far-reaching, and it does not terminate with the revocation of the druggist's license. It reaches out in every walk of life. The economic loss cannot be exactly measured; it is like a gigantic octopus, having its tentacles in the home, in the office, in the bank, and it has even been felt in the administration of justice.

We note with regret that the plaintiff in error attached to his brief a supplement which

contains excerpts from the Journal of the American Medical Association, dated June 3, 1922. Matters of this kind are purely extraneous, entirely outside of the record. At the outset, we desire to say that it is very difficult to ascertain from the reading of the said supplement who is responsible for the resolution set out therein. It is evidently a very feeble attempt to recoup lost ground. Not for the purpose of making this brief pretentious, but for the sole purpose of overcoming what purported effect the supplement might have, we desire to say that even as early as 1920, we are reliably informed, out of 152,627 practicing physicians in the United States, only 33,379, or 22 per cent., held permits to prescribe medicinal whiskey as provided for under the Volstead Act.

Doctors Benedict and Dodge, conducting research in the Carnegie Nutrition Laboratory under the auspices of the Carnegie Institution at Washington, D. C., after a number of laborious experiments, and giving the matter a great deal of studious attention determined that "Alcohol is always a depressant poison, no matter how small the quantity taken."

At the annual meeting of the American Medical Association in 1918, the president, Dr. Mayo, appealed to the entire medical profession to join

in the prohibition fight as the most important means of promoting public health. It is a well known fact that at the Mayo Institute at Rochester, Minn., one of the pre-eminent medical resorts in the world, the use of alcohol or whiskey as a medicine is practically unknown.

The following eminent doctors agree that alcohol instead of being beneficial and curative in its effects as a medicine is a dangerous impediment to the curative processes and causes a predisposition to contract diseases:

Dr. A. C. Abbot, University of Pennsylvania.
Dr. C. H. Hodge, Clark University.
Dr. Stockard, Cornell Medical College.
Dr. Reid Hunt, U. S. Hygienic Laboratory.
Dr. T. Laitinen, Helsingfors, Finland.

It must be further pointed out that Dr. Ford Craiger, eminent medical authority, medical superintendent of the Southwestern Fever Hospital, M. A. B., London, England, says:

> "I rank myself with those who hold that in most cases of enteric fever, not only is alcohol not required, but that its employment is occasionally distinctly harmful, even when given in quantities which would not be considered excessive."

Another eminent British physician, Sir James Barr, M. D., says:

> "Pneumonia and typhoid fever are two principal diseases in which alcohol has been

> largely prescribed but in the latter disease it is even more useless than in the former; there is scarcely an indication for its use, while the protracted nature of the disease allows this medicament more time to work mischief."

Sir Thomas Barlow, M. D., president of the Royal College of Physicians, said in an address to the International Medical Congress of 1913, of which he was president:

> "Let us adopt the common sense which ought to belong to our profession and stamp out these medicated wines."

Perhaps this discussion, and the authorities thereon, would become too involved if pursued any further. For practical purposes, it might be sufficient to say that whiskey has no medicinal value whatever.

In addendum, we wish to urge that the liquor traffic, in all of its phases, is at best a matter of sufferance rather than a privilege. The right to sell intoxicants is not a privilege or an immunity that would fall within the scope and meaning of the Fourteenth Amendment of the Constitution of the United States, and it would follow that each state by restrictive statutes on the traffic does not in any way abridge any of the rights guaranteed to a citizen under the United States Constitution. The right to dispense medicinal whiskey is not a privilege, but

is rather in the nature of a sufferance, or a matter of tolerance on the part of this state, and the city of Los Angeles, through the ordinance here considered, does not, therefore, in any way deprive a citizen of his liberty or property without due process of law. Similar situations have been discussed in the following cases:

James Clark Distilling Co. v. Western Maryland Railroad Co., 242 U. S. 311;
Eberle v. Michigan, 232 U. S. 700;
Phillips v. Mobile, 208 U. S. 472.

Conclusion.

1. That the ordinance of the city of Los Angeles is not in conflict with federal legislation on the same point;

2. That the ordinance is consistent and in harmony with the law and statutes made and provided for the regulation and prohibition of the liquor traffic;

3. That the only purpose of the ordinance is to regulate the use of medicinal liquors.

4. That the city of Los Angeles has inherent police power to regulate the sale of medicinal liquors;

5. That there is sufficient cause existing for the further regulation of medicinal liquors;

6. That the city of Los Angeles, vested with police power, has the inherent right to pass such ordinance in the exercise thereof, for the purpose of regulating the sale of medicinal liquors;

7. That the said city ordinance is not in conflict with the Fourteenth Amendment to the Constitution of the United States.

We conclude with the proposition first laid down by the respondent, that the ordinance is fully consistent and in harmony with all national legislation pertaining to prohibition, and that nobody is injured by the operation of said ordinance. Little, in fact, is the therapeutic effect, even from the standpoint of the proponents of medicinal whiskey, upon the patient, whether the prescription is for eight ounces or sixteen ounces. The ordinance does not deprive the druggist of either his liberty or property by requiring him to fill two prescriptions instead of one, and since the physician is not a party to these proceedings, the court, as heretofore pointed out, we believe, cannot consider his contention that he is being deprived of his discretion in treating his patient as he sees fit. These proceedings were not instituted at his instance or for his benefit.

We, therefore, respectfully submit that the writ be dismissed and the plaintiff in error be remanded to the custody of the chief of police of the city of Los Angeles.

Respectfully submitted,

J. M. FRIEDLANDER,
City Prosecutor, City of Los Angeles,
S. W. ODELL,
Of Counsel,
Attorneys for Defendants in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 420.

MERLIN W. HIXON, PLAINTIFF IN ERROR,

vs.

LOUIS D. OAKES, DEFENDANT IN ERROR.

BRIEF OF AMICUS CURIAE.

E. C. BROKMEYER,
General Attorney,
National Association of Retail Druggists.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

INDEX.

	Page
Statement	1
Local ordinance [Tr. of Rec., pp. 14 and 15]	1, 2
Writ of habeas corpus [Rec., p. 44]	2
Power to impose absolute prohibition of intoxicating liquors for medicinal purposes (40 California Appeal Decisions, V. 21) [Rec., pp. 95-100]	2
Writ of Error [Rec., p. 141]	2
Questions of law	2, 3
Argument	3
Eighteenth Amendment, Federal Constitution [Rec., p. 25, Ex. "B"]	3
National Prohibition Act (42 Stat., 222)	3
Regulations 60, Bureau of Internal Revenue, U. S. Treasury Department	3
By ratifying the Eighteenth Amendment to the Federal Constitution the State of California and all its political subdivisions are bound by its provisions	3
Lever *vs.* Garnett, 258 U. S., 130	3
Hawke *vs.* Smith, No. 1, 253 U. S., 221	3
Hawke *vs.* Smith, No. 2, 253 U. S., 231	3
National Prohibition Cases (Rhode Island *vs.* Palmer, 253 U. S., 350, 386)	3
"Beverage" a word of limitation in the Eighteenth Amendment to the Federal Constitution (Sec. 1, Eighteenth Amendment) [Rec., p. 25]	4
Non-beverage uses sanctioned by title of National Prohibition Act (41 Stat., 305)	4
Articles "unfit for use for beverage purposes" expressly exempted by National Prohibition Act (Sec. 4, Title 2)	4
Medicinal and industrial use of intoxicating liquors sanctioned by National Prohibition Act (Sec. 7)	5

Page

Power of Congress to limit prescribing by physicians of intoxicating liquors as medicine denied (Lambert *vs.* Yellowley, not yet reported) [Blakemore on Prohibition, pp. 219-220]—Judge Knox's opinion 5

If Congress executed its power under the Eighteenth Amendment to the Federal Constitution by limiting prescribing of intoxicating liquor as a medicine to 16 ounces in ten days (National Prohibition Act—Sec. 7, Title 2), and by limiting physicians to 100 prescription blanks in 90 days (An Act Supplemental to the National Prohibition Act—Sec. 2), how can the City of Los Angeles, exercising delegated power, further limit the quantity to 8 ounces and thus destroy the value of intoxicating liquor for medicinal purposes [Local ordinance—Rec., p. 15] 6

Local ordinance repeals Sec. 77(c) of Art. 13, of Regulations 60, for the enforcement of the National Prohibition Act, limiting prescribing of liquor as medicine to a particular Federal prescription blank 7

Local ordinance prohibits use of any except liquor prescription blank it provides for medicinal purposes Rec., p. 15] 7

Can a city amend or repeal the Federal Constitution and statutes governing intoxicating liquors? 8

Can Congress substitute its judgment for that of a physician in the prescribing of medicine? (Cong. Rec., Vol. 61, Part 4, 67th Cong., 1st Session, pp. 3455 and 3456) 9

Shall a physician commit a felony to save human life? (Cong. Rec., Vol. 61, Part 4, 67th Cong., 1st Session, p. 3458) 9

Would the Eighteenth Amendment have been ratified if it had provided for prohibition of intoxicating

Page

liquors for medicinal as well as beverage purposes (Senator Knox, Cong. Rec., Vol. 61, Part 4, 67th Cong., 1st Session, p. 3595) 10

"Reasonable relation" to prohibition of intoxicating liquors for beverage purposes (Purity Extract Co. *vs.* Lynch, 226 U. S., 192—Cong. Rec., Vol. 61, Part 4, 67th Cong., 1st Session, p. 3595) 11

Power to expand purpose for which intoxicating liquor is used 11

Distinction between "regulation" and "prohibition" of intoxicating liquor for beverage purposes 12

Majority of physicians favor use of alcoholic liquor as a medicine (Latest poll by American Medical Association) although originally opposed to it [Cong. Rec., Vol. 61, Part 4, 67th Cong., 1st Session, p. 3596] 13

Alcohol "a genuine therapeutic agent" (British Medical Research Council) 14

Whiskey restored to United States Pharmacopoeia in latest revision because as medicine it requires an official standard (American Pharmaceutical Association Journal, February, 1924) 14

Can citizens obtain competent medical and pharmaceutical service sanctioned by the Constitution and statutes for its enforcement? 16

Right of a city or state to prohibit intoxicating liquor for industrial purposes and repeal Title 3, National Prohibition Act (41 Stat., 305) 16

Alcohol a "key" industry during World War 16

Uses of alcohol (Rep. No. 411, 55th Cong., Dec. 17, 1897) 16, 17

Alcohol the life of chemical and many other industries (Recommendations of the Alcohol Trades Advisory Committee, appointed by the Commissioner of Internal Revenue, Oct. 20, 1923

Page

(Sen. Doc., No. 44, 68th Cong., 1st Session—Ex. "A," attached) 17, 18, 19
"Reasonable" to suppress the means of national defense to prohibit the traffic in beverage liquor? 20
"Reasonable" to suppress alcohol for the manufacture of more than 5,000 non-beverage articles in commerce to prohibit beverage liquor traffic? 20
"Reasonable" to destroy the means of saving human life to effectuate prohibition of the beverage liquor traffic? 21
Limits to Federal and State authority over beverages (Rhode Island *vs.* Palmer, 253 U. S., 405) 21
Relation of Federal and State Governments to "prohibition" not the same since as before the adoption of the Eighteenth Amendment to the Federal Constitution 21
Eighteenth Amendment operative throughout the entire territorial limits of the United States (Rhode Island *vs.* Palmer, supra) 22
What is not expressly prohibited is permitted 22
Permissive provisions of the National Prohibition Act 22
Power granted to Congress to enforce Eighteenth Amendment, permissive as well as prohibitory provisions, not dependent on state action (Rhode Island *vs.* Palmer, supra) 22, 23
Limitations in the Eighteenth Amendment to the Federal Constitution 23
Distinction between "beverage" and medicine made by Congress (National Prohibition Act, supra, Sec. 1, Title 2) 24
"Absolute prohibition" of medicinal liquor amends the Eighteenth Amendment to the Federal Constitution 24, 25
"Absolute prohibition" repeals Sec. 3, of Title 2, National Prohibition Act, sanctioning liquor for non-beverage purposes 25
"Absolute prohibition" also repeals Sec. 4, of Title 2, National Prohibition Act 25
Legal obligations to the public imposed on physicians and pharmacists 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 420.

MERLIN W. HIXON, PLAINTIFF IN ERROR,

vs.

LOUIS D. OAKES, DEFENDANT IN ERROR.

BRIEF OF AMICUS CURIAE.

This brief is filed on behalf of the National Association of Retail Druggists, as amicus curiae.

This association is an incorporated body, organized under the laws of the State of Illinois, represents retail druggists in every state in the union, including California and Los Angeles, and has functioned for more than twenty-five years.

Although the facts are recited in the brief for plaintiff in error, an abstract is here presented.

Merlin W. Hixon, plaintiff in error, qualified under the law of California to practice pharmacy in Los Angeles, and holding a Federal permit to dispense 16 ounces of liquor within 10 days for medicinal purposes upon a physician's prescription, was arrested September 8, 1921, on a charge of having sold upon a physician's prescription intoxicating liquor for medicinal purposes in excess of 8 ounces, in violation of Section 2 and subdivision (c) of Section 5, of Ordinance No.

37,699 (New Series). [Transcript of Record, pp. 14 and 15.]

On June 13, 1922, a petition for discharge of plaintiff in error was filed and a writ of habeas corpus [Rec., p. 44] was issued by the District Court of Appeal of the State of California, directing the Chief of Police, Louis D. Oakes, defendant in error, to produce the body of plaintiff in error before that court on a subsequent date. Plaintiff in error was released on bail and evidence was taken by the District Court of Appeal to determine whether alcoholic liquor was indispensable in the treatment of disease and whether a limitation to 8 ounces in prescribing rendered a prescription valueless.

On February 28, 1923, the District Court of Appeal held that the city of Los Angeles, in the exercise of its police power, delegated to it in its charter by the state, could forbid entirely the sale of intoxicating liquor for medicinal purposes (40 California Appeal Decisions, 521—not California Appeals Reports), [Rec., pp. 95-100]. The writ of habeas corpus was discharged and the plaintiff in error was remanded to the Chief of Police.

It was contended by counsel for respondent, the Chief of Police, that the municipality enjoyed such large police powers that the right of physicians to prescribe liquor for medicinal purposes could be abridged and taken away.

On May 18, 1923, Hon. Frank J. Finlayson, presiding justice of the District Court of Appeal, Second Appellate District, Division 2, allowed a writ of error [Rec., p. 141] to be directed by this court to the District Court of Appeal, in accordance with the statute, requiring said court to certify a record of its proceedings to this court for review and the correction of possible errors.

The questions involved are as follows:

1. The right of a state or municipality, contrary to

the Eighteenth Amendment to the Federal Constitution (Rec., Ex. "B," p. 25), and the National Prohibition Act (41 Stat., 305), the Act supplemental to the National Prohibition Act (42 Stat., 222) and Regulations 60, Bureau of Internal Revenue, Treasury Department, for their enforcement, to prohibit or restrict prescribing and dispensing of medicine by properly licensed persons.

2. The right of a state or municipality to deny citizens of the United States and of the several states medicine containing alcoholic liquor in such quantity and form as qualified physicians may prescribe and qualified pharmacists may compound and dispense in conformity with the organic act and the Federal statutes enacted for its enforcement.

3. The right of a state or municipality to prohibit the manufacture, sale, transportation, importation and exportation of intoxicating liquor for industrial purposes.

ARGUMENT.

The State of California ratified the Eighteenth Amendment to the Federal Constitution. By this act it not only bound itself, but all of its political subdivisions, to abide by its provisions. (Leser *vs.* Garnett, 258 U. S., 130.) As stated by Mr. Justice Brandeis, in delivering the opinion of this court, in Leser *vs.* Garnett (supra), "the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a Federal function, derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a state. Hawke *vs.* Smith, No. 1, 253 U. S., 221; Hawke *vs.* Smith, No. 2, 253 U. S., 231; National Prohibition Cases (Rhode Island *vs.* Palmer, 253 U. S., 350, 386.)"

If the function of a state legislature in ratifying a proposed amendment to the Federal Constitution is a Federal function and transcends any limitations sought to be imposed by the people of a state, by what authority can the city of Los Angeles exceed the limitations of the Eighteenth Amendment to the Federal Constitution? What are these limitations? The limitation of prohibition of the liquor traffic to "beverage purposes." "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited." (Section 1, Eighteenth Amendment to the Constitution of the United States) [Rec., p. 25]. If the word "beverage" is not a word of limitation, why was it included by Congress when the amendment was submitted to the states for ratification? The best evidence of the intent of Congress in drafting the amendment to limit the prohibition of the liquor traffic to "beverage purposes" is to be found in the National Prohibition Act (41 Stat., 305) itself. In its very title will be found the following:

> "An act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries."

Further evidence of the intent of Congress to prescribe a limitation on the prohibition of intoxicating liquor to such as is applied to "beverage purposes" is found in Section 4, of Title 2, of the National Prohibition Act, where articles "unfit for use for beverage purposes" are expressly exempted from the provisions

of the act, including medicinal preparations manufactured according the United States Pharmacopoeia and National Formulary formulas, patented, patent and proprietary medicines, toilet, medicinal and anticeptic preparations and solutions and flavoring extracts and syrups.

Additional evidence of the intent of Congress to provide for the nonbeverage use of liquor, as sanctioned by the Eighteenth Amendment, will be found in Section 7, Title, of the National Prohibition Act, providing that no one but a physician holding a permit may prescribe liquor, that it must be prescribed in good faith as a medicine and that "not more than a pint of spirituous liquor to be taken internally shall be prescribed or used by the same person within any period of 10 days and no prescription shall be filled more than once." The power of even Congress to make this limitation upon the right of a physician to prescribe medicine has been denied by Federal Judge Knox in Lambert *vs.* Yellowley, not yet reported [Blakemore on Prohibition, pp. 219-220]. In his opinion Judge Knox said:

> "The Eighteenth Amendment was designed to bring about the prohibition of intoxicating liquor for beverage purposes, and was not, I think, intended to put an end to the use of liquor for purposes regarded by those who proposed the amendment, and by many of the states that ratified it, as justifiable and proper. Instead of manifesting the same solicitude for the physical well-being of a person suffering from disease that it evinced for the spiritual comfort and welfare of certain religious sects, Congress restricted, in the manner complained of, the medicinal use of intoxicating liquors. If the administration to a patient of more than the statutory quantity of liquor is necessary for his relief from a certain known ailment, the inability of

such patient to have his legitimate needs supplied means that he is subjected to a prohibition that certainly is not within the terms of the Eighteenth Amendment, and which it easily may be imagined might subject him to serious consequences if not death itself. It would seem not to be a function of Congress, particularly under the amendment (Eighteenth) to invade, as it were, the domain of medical authority, and to deprive patients of what they need and by every principle of right and justice are entitled to have. Having assumed to do so, it would appear that the act does not constitute legislation appropriate to the object sought to be obtained through the adoption of the amendment. To me it seems reasonably clear that the right of the public to have available for its use an adequate supply of a valuable therapeutic agent transcends the present power of Congress to decree otherwise upon the basis of expediency or policy."

If Congress transcends its power under the Eighteenth Amendment by limiting in the National Prohibition Act the quantity of liquor which may be prescribed for one patient to not more than one pint within 10 days for medicinal purposes (Section 7, Title 2), and further by limiting physicians to not more than 100 prescription blanks for use in any period of 90 days (Section 2, an act supplemental to the National Prohibition Act, 42 Stat., 222), how can the city of Los Angeles, exercising power delegated by the State of California under its charter, further limit the quantity of liquor available for medicinal purposes by limiting a prescription to 8 ounces, prohibiting its refilling, limiting its selling to the date of issuance, and providing that "no other form of prescription" may be lawfully used? [Section 5(c), Rec., p. 15.] If the ordinance of the city of Los Angeles prescribing these limitations

is valid, what becomes of Section 77(c) of Article 13 of Regulations 60, Bureau of Internal Revenue, Treasury Department, for the enforcement of the National Prohibition Act? This Federal regulation provides that "all prescriptions for intoxicating liquor must be made upon Form 1403 and must contain all the data called for by such form, except that in case where a physician holding a permit to prescribe liquor is not in possession of such form, due to any reason justifying such condition, and delay in procuring the same might result in loss of life, aggravation of an ailment, or intense suffering, he may prescribe intoxicating liquor upon a form other than Form 1403: Provided, however, that such form of prescription must contain all the information called for on Form 1403." The Los Angeles ordinance provides that "no other form of prescription shall be deemed to be within the intent of this section." [Rec., p. 15.] The Federal prescription permit thus is made unlawful in Los Angeles. Plaintiff in error has such a permit. He was arrested and convicted for doing what the Federal law and regulation pronounce a lawful act. The conflict between the Los Angeles ordinance and the Federal statute and regulations does not end here. Although "no other form of prescription shall be deemed to be within the intent of this section" (the Los Angeles ordinance), Regulations 60, revised, March, 1924, provides in Section 1412 that "no physician shall issue any prescription for liquor other than on the prescribed Form 1403, and no druggist or pharmacist shall fill any prescription other than on such Form 1403, except that in the case of an epidemic or a sudden and unforeseen accident or calamity a physician holding a permit to prescribe may issue a prescription for intoxicating liquor upon a form other than Form 1403, where failure to issue such prescription might result in loss of life or intense suffering,

but such a prescription shall describe fully the accident, calamity, or circumstances constituting the emergency because of which the unofficial blank is used." It is true that Regulations 60, revised, March, 1924, instruct Federal prohibition directors not to authorize physicians to prescribe intoxicating liquors in violation of state or local laws, but the fact is that plaintiff in error holds a Federal permit under regulations issued for the enforcement of the National Prohibition Act and the Act Supplemental to the National Prohibition Act authorizing him to dispense 16 ounces of intoxicating liquor upon a physician's prescription to a patient for medicinal purposes within 10 days, while the Los Angeles ordinance limits the quantity to 8 ounces and prohibits the use of any but the local form of prescription. If now the Federal Prohibition Department has concluded to avoid conflict with state or local authorities in the enforcement of the National Prohibition Act, by what authority can the Executive Department of the Federal Government authorize a state or city to amend or repeal the Federal statutes and the Federal Constitution?

We now come to the question as to the right of a state or municipality to deny citizens of the United States and of the several states medicine containing alcoholic liquor in such quantity and form as qualified physicians may prescribe and qualified pharmacists may compound and dispense in conformity with the organic act and the Federal statutes enacted for its enforcement. While the act supplemental to the National Prohibition Act was in the form of H. R. 7294 and under consideration in the Committee of the Whole of the Senate, Senator Spencer, of Missouri, asked Senator Sterling of South Dakota, in charge of the bill, the following question:

> "Will the Senator be good enough to tell me how the Committee on the Judiciary of the

> Senate ever felt qualified to substitute their judgment for the judgment of the physician as to the amount of wine that a physician might prescribe for a patient?"
>
> Mr. STERLING: "The Senator might aske the same question with reference to the provisions of the original act, which provides that no more than one pint of spirituous liquors shall be prescribed for use within any period of 10 days. It is deemed as a necessary restriction and safeguard upon the sale of intoxicating liquors. That is the object. It was thought that ought to be ample." (Congressional Record, Vol. 61, Part 4, 67th Congress, 1st Session, pages 3455 and 3456).

At another point in the debate Senator Gerry, of Rhode Island, asked Senator Sterling the following question:

> "Under the second section of this bill, if I understand it correctly, a physician may not prescribe more than one-half pint of alcohol, no matter how seriously ill his patient may be and no matter how absolutely necessary his medical judgment may tell him that this stimulant is. In other words, if a physician believes that he can only save a patient's life, say, in a case of pneumonia, by prescribing an additional amount of alcohol above the one-half pint that the law provides for, he must commit a felony or a misdemeanor. Am I correct in that?"
>
> Mr. STERLING: "I think so. The bill by its terms provides that not more than one-fourth of one gallon of vinous liquor may be prescribed for use by any person within a period of 10 days, or liquors, vinous or spirituous, or both, which contains more than one-half pint of alcohol." (Congressional Record, Vol. 61, Part 4, 67th Congress, 1st Session, pages 3458.)

The late Senator Knox, a constitutional lawyer of recognized distinction, and once Attorney General of

the United States, expressed his positive conviction to the Senate that the Eighteenth Amendment "contained limitations with respect to only one thing, and those limitations were the right to manufacture, sell, or transport intoxicating liquors 'for beverage purposes.'" During the debate on H. R. 7294 (supra) Senator Knox said:

> "When the Eighteenth Amendment was before this body I took the trouble to read it before I voted upon it; and when I read it I found that it contained limitations with respect to only one thing, and those limitations were the right to manufacture, sell, or transport intoxicating liquors 'for beverage purposes.' I was willing, Mr. President, and my vote so indicated, that that question should be submitted to the American people. Had the Eighteenth Amendment placed these limitations upon the use of intoxicating liquor for beverage and medicinal purposes, I would not have voted for the Amendment; and I do not propose by my vote to import into this amendment that which never was dreamed of by its proponents and is not even claimed by the language of the pending bill, because its supporters recognize the therapeutic value of liquors of different character and only seek to put their hands upon the discretion of the medical profession in its prescription. Mr. President, it is not my purpose by my vote to put an insult upon that great and noble profession to which we all must turn at many times in our lives for the protection of our lives; neither do I intend by my vote to put an insult upon my own intelligence by conceding that a constitutional amendment limited to beverage purposes can be stretched in such a way as to place any restriction upon the use of liquor for any other purpose." (Congressional Record, Vol. 61, Part 4, 67th Congress, 1st Session, page 3595.)

The debate in the Senate referred to is illuminating

in another direction. The case depended upon by Presiding Judge Finlayson, of the District Court of Appeal of the 2nd Appellate District of the State of California, in his decision against plaintiff in error, Purity Extract Company *vs.* Lynch, 226 U. S., 192, was used by Senator Walsh, of Montana, in answer to Senator Knox. (Congressional Record, Vol. 61, Part 4, 67th Congress, 1st Session, page 3595.) Senator Walsh quoted from the opinion of this court in that case, as follows:

> "When a state exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition, the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government."

Senator Pomerene, of Ohio, replied:

"Mr. President, the expression of the court is 'it may adopt such measures having reasonable relation.'"

Mr. WALSH, of Montana: "Undoubtedly."

Mr. KNOX: "I entirely agree with what the Senator from Montana says about the decision in that case; but does not the Senator from Montana recognize the distinction between the legislative power to determine what is an intoxicant and the legislative power to expand the purpose for which it shall be used?"

Mr. WALSH, of Montana: "I do not distinguish in that regard. If it may be used for medicinal purposes—as, of course, it may be under the Constitution and the law—and the manufacture and the use of it for medicinal purposes is likely to lead, as it undoubtedly is, to the manufacture

> and sale of it for beverage purposes, it is unquestionably within the power of Congress to regulate the use of it and the manufacture of it for medicinal purposes in order that it shall not be diverted from that use and used for the prohibited purpose."

It will be noted that Senator Walsh, although the first to cite Purity Extract Company *vs.* Lynch (supra) as the highest authority to sustain the pending bill, conceded that intoxicating liquor "may be used for medicinal purposes under the Constitution and the law," contending only that it is "within the power of Congress to regulate the use of it and the manufacture of it for medicinal purposes in order that it shall not be diverted from that use and used for the prohibited purpose." Regulation of a use is one thing and prohibition of a use is quite another. Even Senator Walsh did not go so far as to advocate prohibition of the use of intoxicating liquor for medicinal purposes in order to effectuate the Eighteenth Amendment prohibiting traffic in intoxicating liquor for beverage purposes. It is respectfully submitted, therefore, that the learned Presiding Judge of the District Court of Appeal for the Second Appellate District of the State of California erred when holding that "though alcoholic liquor when used for certain purposes may be beneficial and useful, still its sale even for such beneficial and useful purposes may be prohibited if it can be seen that prohibitory measures of that nature have a real and substantial relation to the suppression of all traffic in intoxicants for beverage purposes." [Rec., p. 98.[Again Senator Walsh stresses the power of Congress to "regulate," but not the power of Congress to prohibit, the manufacture and sale of intoxicating liquors for legitimate purposes to prevent the manufacture and sale for beverage purposes if such reasonable legislation is calculated to effect that end.

During the debate in the Senate referred to (Congressional Record, Vol. 61, Part 4, 67th Congress, 1st Session, page 3595), Senator Walsh said:

> "Accordingly, we must regulate the manufacture and sale of liquor for medicinal purposes, and in doing so beyond question we may prohibit the prescription by the physician of such liquor as in the judgment of the medical profession has no therapeutic value."

The liquor in question was beer. In support of his contention that beer possessed no therapeutic value, Senator Walsh thereupon quoted a resolution adopted by the American Medical Association, declaring that "the use of alcohol as a beverage is detrimental to the human economy and its use in therapeutics as a tonic or a stimulant or as a food has no scientific basis," and that therefore "the use of alcohol as a therapeutic agent should be discouraged." (Congressional Record, Vol. 61, Part 4, 67th Congress, 1st Session, page 3596.) This resolution was quoted in 1921. Since that time a poll of the physicians of the United States taken by the American Medical Association showed that a majority of the physicians of the country recognize the therapeutic value of alcoholic liquor and favor its use for medicinal purposes.

A referendum on the use of alcohol in the practice of medicine was conducted by the American Medical Association and the result will be found in the Journal of the American Medical Association (Vol. 78, 1922, page 210), the question was:

> "Do you regard whiskey as a necessary therapeutic agent in the practice of medicine?"

The total vote in all the states on this question was 30,843; 15,625, or 51 per cent, of the physicians voting, consisting of members of the American Medical Asso-

ciation, answered "yes" and 15,218, or 49 per cent, answered "no." Questionnaires were sent to 53,900 physicians, representing 37 per cent of the physicians of the United States. Of these 31,115, or 58 per cent, were returned.

"Alcohol, when properly used, is a genuine therapeutic agent. If its use in other connections were unknown, it would still be a valuable item of the Pharmacopoeia. Its true utility, however, is liable to be obscured by the unthinking attribution to it of various activities which it does not possess, and by the popular custom of recourse to it in almost every emergency." (Report of the Alcohol Investigating Committee of the British Medical Research Council, published in the Pharmaceutical Journal and Pharmacist, official organ of the Pharmaceutical Society of Great Britain, issue of April 5, 1924, page 354.)

Although there is testimony in this case that there is no standard in the United States Pharmacopoeia for whiskey, and that it was omitted from this official publication as a therapeutic agent [Rec., p. 83], it is evident the witness was not aware that standards for whiskey and brandy as medicine will be included in the new U. S. Pharmacopoeia now in course of revision. Some years ago whiskey was deleted from the Pharmacopoeia, owing to a spirited controversy among physicians over a proper definition. In the Journal of the American Pharmaceutical Association, February, 1924, will be found the following:

> "Announcement has just been made by E. Fullerton Cook, Chairman of the Revision Committee of the United States Pharmacopoeia, that standards for whiskey and brandy as medicine will be included in the new Pharmacopoeia, now being revised. This is in response to a demand by the physicians of the country. Under the national prohibition laws, whiskey and brandy

are classed as medicine and as such are legally prescribed in many cases of serious illness, but at the present time no legal standards exist for their purity. All physicians of the General Revision Committee, acting as a subcommittee, were appointed to study the situation and take the necessary action. This subcommittee has issued the following statement:

> "'In view of the fact that a large number of physicians of the United States believe alcohol to be a valuable therapeutic agent, and in view of the widespread adulteration of the alcoholic liquors at present available, some members of this referee committee feel that for the protection of the public there should be an official standard for medicinal spiritis.'
>
> "By including standards for whiskey and brandy as medicine, in the Pharmacopoeia, which is the legal standard for drugs and medicines under the Food and Drugs Act, the machinery of the U. S. Department of Agriculture and of the boards of health and boards of pharmacy throughout the country is enlisted in protecting the sick against adulterated and poisonous products."

The physicians constituting the General Revision Committee of the U. S. Pharmacopoeia are prominent members of the American Medical Association and reflect its policy. That the attitude of the American Medical Association respecting the therapeutic value of whiskey has changed since the adoption of the resolution referred to during the debate in the Senate in 1921 (supra) can not be denied. If it had not been changed, it is certain that the physicians constituting the General Revision Committee of the United States Pharmacopoeia never would have consented to restore a standard for whiskey in that official publication.

The question arises, what right has a state or municipality to deny citizens of the United States and of the

several states medicine containing alcoholic liquors in such quantity and form as qualified physicians may prescribe and qualified pharmacists may compound and dispense in conformity with the Eighteenth Amendment and the National Prohibition Act and the act supplemental thereto?

We now come to the question as to the right of a state or municipality to prohibit the manufacture, sale, transportation, importation and exportation of intoxicating liquor for industrial purposes. While this question was not directly raised in the case at bar, it is directly involved. If the sale of intoxicating liquors for medicinal purposes may be "absolutely prohibited," because it "opens the door to that train of evils which admittedly follows upon their general use as beverages" [Rec., p. 99], as contended by the learned Presiding Judge of the District Court of Appeal for the Second Appellate District of the State of California, it logically follows that the sale of intoxicating liquor for industrial purposes may be "absolutely prohibited" for the same reason. If it be within the police power of a city, or state, to impose such "absolute prohibition," Title 3 of the National Prohibition Act (41 Stat., 305) may be thereby repealed. Title 3 of the National Prohibition Act governs the manufacture, sale, transportation, exportation and importation of alcohol for industrial purposes. During the late world war the production of nonbeverage alcohol was rated as one of the "key" industries of the nation. This is what a joint select committee of Congress had to say about alcohol as far back as 1897:

> "The uses of alcohol other than as a beverage are more largely and widely extended than is generally supposed. But while the use of alcohol as a beverage is purely voluntary its employment for all other purposes is legitimate, beneficial and necessary. No article entering into manu-

facture or the arts, whether of domestic or foreign production, performs more legitimate or beneficial functions. There is scarcely a manufacturer in the country who does not use alcohol in the production of his goods to a greater or less extent." (Report No. 411, 55th Congress, December 17, 1897.)

In a statement and recommendations prepared for the Bureau of Internal Revenue, Department of the Treasury, by its Alcohol Trades Advisory Committee, October 20, 1923, [Senate Document 44, 68th Congress, 1st Session] (Ex. "A," attached), this statement appears:

"Generally speaking, there can be no great development of chemical industry without alcohol any more than there could be a steel industry without pig iron, an electric industry without copper, or a fertilizer industry without potash and fixed nitrogen. While alcohol may not be used directly in the manufacture of textiles, automobiles and innumerable other ordinary articles of commerce, any chemist could draw a flow sheet to show the relation of alcohol to the units assembled in the fabrication of the finished products. Prior to the passage of the taxfree denatured alcohol act of June 7, 1906, comparatively little alcohol was used for industrial purposes, or in broadgauge scientific research, for the reason that a prohibitory tax was imposed and collected thereon regardless of its nonbeverage utilization. (A tax of approximately $4.18 per liquid gallon still attaches to pure alcohol used in medicines, flavoring extracts, and certain other nonbeverage products, and even to that required for ordinary commercial laboratory purposes.) Despite handicaps, the nonbeverage use of alcohol (pure and denatured) has grown to healthy proportions, as will be shown by the official governmental statistics. Those figures, however, pale into insignificance when compared with the production and use of alcohol for industrial purposes in European

countries. As an illustration, for many years preceding the world war, Germany produced and used, for other than beverage purposes, an average of about 100,000,000 gallons annually. It may be interesting to note the following extract from an article written by the late Commissioner of Internal Revenue, John G. Capers, published in Harper's Weekly, October 3, 1908:

> " 'Industrial alcohol is a matter of nearly as much concern to the German Empire as its army and navy; in fact, the elder Emperor inaugurated the industry for the primary purpose of having a source of light, heat and power within the empire independent of petroleum products, of which Germany has none. That wise old emperor, realizing that some day his empire might be forced, in time of war, to be self-dependent and resourceful within its own borders, determined to be independent of petroleum products, all of which were and still are shipped into Germany from other countries, and an elaborate paternal system was inaugurated, to insure as the Government's ultimate safety source of life, heat and power the alcohol which would be produced from the German potato, now so carefully cultivated for that purpose as it has been for nearly 40 years.'
>
> "While the future uses of alcohol will be coextensive with the progress of chemical industry, there are a few uses the expansion of which will be more or less revolutionary in character, such as in the production of liquid motor fuels to supplement the rapidly diminishing supply of petroleum suitable for the purpose, and other adaptations which are at this time subject to practical experimentation and scientific research. From where is the essential future supply of alcohol for governmental, industrial and scientific purposes to come? Under present conditions of prohibition law enforcement we have real cause to be concerned. Alcohol is a basic chemical required in the production of smokeless

powder, trinitrotoluol, cordite, and like explosives, poison gases, areoplane 'dope' and other war materials, in addition to its essential use in hospital supplies, etc. Moreover, according to many experts of world-wide authority, alcohol, in admixture with other compounds, will furnish the ideal future fuel for aircraft and other internal combustion engines demanded by the Army and Navy; in fact, alcoholic fuels which have met every practical test to which they have been subjected are now being produced and used in the United States. That Congress foresaw the difficulties of chemical research and industrial development under a law prohibiting the manufacture, sale and use of intoxicating liquors for beverage purposes is well demonstrated in the wording of the very title of the National Prohibition Act and in the care taken to prescribe a separate and special title of said act under which the alcohol therein specifically defined was to be thereafter manufactured, transported, sold and used for all nonbeverage purposes. Expressed differently, Congress provided by Title 3 of said act a complete basic code which, if intelligently and justly followed, would have freed industrial alcohol from the absurd distinctions, unwarranted restrictions, and almost intolerable conditions which surround its utilization for nonbeverage purposes under past and current methods of prohibition law enforcement."

The Alcohol Trades Advisory Committee, appointed by the Commissioner of Internal Revenue in respect to the administration of the National Prohibition Act, in 1923, consists of the following: William A. Sailer, Baltimore, Chairman, representing the American Drug Manufacturers' Association; H. E. Howe, Washington, D. C., Secretary, representing the American Chemical Society; W. J. Schiefflin, New York, representing the National Wholesale Druggists' Association; Samuel C. Henry, Chicago, President, National Drug Trade

Conference, representing the National Association of Retail Druggists; Prof. J. H. Beal, Urbana, Ill., Chairman, Board of Trustees, U. S. Pharmacopoeia, Emeritus Professor of Pharmacy, University of Pittsburgh, representing the American Pharmaceutical Association and Faculties of Pharmaceutical Colleges; Martin H. Ittner, Jersey City, Chief Chemist, Colgate & Company, Jersey City, representing the American Manufacturers of Toilet Articles; Frank A. Blair, New York, representing the Proprietary Association; M. C. Whitaker, New York, President, U. S. Industrial Chemical Company, New York, Perkin Medalist, 1922; R. H. Bond, Baltimore, representing the Flavoring Extract Manufacturers' Association of the United States; Dr. Charles L. Reese, Wilmington, Del., Chemical Director, E. I. du Pont de Nemours & Company, representing the Manufacturing Chemists' Association, and R. M. Cain, Indianapolis, representing the American Pharmaceutical Manufacturers' Association.

Can it seriously be contended that "absolute prohibition" of the manufacture, sale, transportation, exportation and importation of alcohol within the definition of "intoxicating liquor" in the National Prohibition Act, Sec. 1, Title 2) for industrial purposes would be a valid exercise of the police powers of a city, or state, or even Congress, under the Eighteenth Amendment, because it bears a "reasonable relation" to the enforcement of the prohibition of intoxicating liquors for beverage purposes? Would it be "reasonable" to suppress the means of national defense to insure the prohibition of traffic in intoxicating liquors for beverage purposes? Would it be "reasonable" to suppress the manufacture of the more than 5,000 different articles in which alcohol enters as an indispensable manufacturing ingredient, all of such articles "unfit for use for beverage purposes," to effectuate the prohibition

of intoxicating liquors for beverage purposes? Would it be "reasonable" to destroy the means of saving human life during epidemics of pneumonia, influenza, diphtheria, and in cases of old age where weakness of the heart action arises, to insure the prohibition of intoxicating liquors for beverage purposes? "There are limits beyond which Congress can not go in treating beverages as within its power of enforcement," declared Mr. Justice McKenna in his dissenting opinion in the case of Rhode Island *vs.* Palmer (253 U. S., 405), and "those limits are not transcended by the provisions of the Volstead Act." This language was quoted as one of the conclusions of this court. Mr. Justice McKenna added: "Of course, necessarily, the same limitations apply to the power of the states as well. From these premises the deduction seems inevitable that there must be united action between the states and Congress, or, at any rate, concordant and harmonious action."

Whatever the relation between the states and the Federal Government in the enforcement of the National Prohibition Act, the Federal statute for the administration of the Eighteenth Amendment, and the statutes of the several states enacted for that purpose, it is respectfully submitted that both the Federal and state governments, and lesser political subdivisions, sustain a far different relation to so-called "prohibition" under the Eighteenth Amendment than they did prior to the adoption of the Eighteenth Amendment. This court may well have held as it did in Purity Extract and Tonic Company *vs.* Lynch (supra) in the year 1912, when there was no limitation in the Constitution of the United States of the prohibition of intoxicating liquors to "beverage purposes," and when all of the police powers of the states were reserved to the states because not especially granted to the Federal Govern-

ment, so far as the prohibition of the liquor traffic was concerned. With the adoption of the Eighteenth Amendment, however, expressly limiting prohibition of the manufacture, sale, transportation, exportation and importation of intoxicating liquors to "beverage purposes," it no longer can be maintained that cities, or states, or even Congress can impose "absolute prohibition" on the manufacture, sale, transporation, exportation and importation of intoxicating liquors. This court itself has said, in Rhode Island *vs.* Palmer (supra), "that part of the prohibition amendment to the Federal Constitution which embodies the prohibition is operative throughout the entire territory limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act, whether by Congress, by a state legislature, or by a territorial assembly, which authorizes or sanctions what the amendment prohibits." What the Eighteenth Amendment does not expressly prohibit, it impliedly permits. The permissive provisions of the National Prohibition Act, to be found in Titles 2 and 3, are the best evidence of this. If the Eighteenth Amendment, of its own force, invalidates every legislative act which sanctions what the amendment prohibits, does it not logically follow that the Eighteenth Amendment invalidates every legislative act, whether by Congress, by a state legislature, or a territorial assembly, which prohibits what the amendment sanctions?

The National Association of Retail Druggists is also in entire accord with still another conclusion of this court in Rhode Island *vs.* Palmer (supra), as follows:

> "The power confided to Congress by the provisions of the Eighteenth Amendment to the Federal Constitution, that 'the Congress and the several states shall have concurrent power

> to enforce this article by appropriate legislation,' while not exclusive, is territorially co-extensive with the prohibition of that amendment, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in nowise dependent on or affected by action or inaction on the part of the several states or any of them."

Of equal force in sustaining the power of Congress to enact the permissive as well as the prohibitory provisions of the National Prohibition Act and the act supplemental thereto (supra) may be cited the conclusion of this court in Rhode Island *vs.* Palmer (supra), under paragraph 8 of the syllabus, as follows:

> "The words 'concurrent power' in the declaration of the Eighteenth Amendment to the Federal Constitution that 'the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation' do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them, nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign or interstate commerce from intrastate affairs."

Although it is conceded that a state may exceed the Federal Government in its regulation of the manufacture, sale, transportation, exportation and importation of intoxicating liquor for beverage purposes, it is respectfully suggested that the express limitations of the Eighteenth Amendment to the Federal Constitution are binding on the states and the Federal Government with equal force. What limitations are to be found in the Eighteenth Amendment in addition to the limitation provided by the word "beverage"? The "con-

current power" granted to Congress and the several states in the declaration of the Eighteenth Amendment is first limited to the "enforcement of this article" of the Federal Constitution. The next express limitation provided in the Eighteenth Amendment is that "the concurrent power to enforce this article" shall be by "appropriate legislation." Does the word "beverage" in "this article" of the Federal Constitution mean, or can it mean, "medicinal" as applied to "purposes"? When as a beverage been considered a medicine? Certainly the definition of "intoxicating liquor" in the National Prohibition Act (supra) makes a distinction between a beverage and "intoxicating liquor," the Congress having declared that its definition of "intoxicating liquor" "shall not extend to any beverage or liquid if it contains less than one-half of one per centum of alcohol by volume." (Section 1, Title 2, National Prohibition Act.) This is what Congress declares is the distinction between "beverage" and nonbeverage purposes for which intoxicating liquor may be used. Congress must have felt obligated to duly regard the express limitation provided in the Eighteenth Amendment in the word "beverage" qualifying "purposes." Otherwise it would not have provided this definition of "intoxicating liquor." It is respectfully suggested that if the Congress concluded there were limitations beyond which it could not go in prohibiting intoxicating liquor for beverage purposes, there must be some limitation on the police powers of a state or city in effectuating the Eighteenth Amendment. "Absolute prohibition" "for certain purposes," even though "beneficial and useful," decreed as within the police power of a state or city by the District Court of Appeal for the Second Appellate District for the State of California [Rec., p. 98], constitutes nothing short of an amendment to the Eighteenth Amendment of the Federal Constitution.

This amendment in the case at bar amends Section 1 of the Eighteenth Amendment by inserting after the word "beverage" the words "medicinal and industrial," so that it will read as follows:

> "Eighteenth Amendment—Sec. 1.—After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States, and all territory subject to the jurisdiction thereof for beverage, medicinal and industrial purposes is hereby prohibited."

The exercise by a state or city of its police power to impose "absolute prohibition" of the manufacture, sale, transportation, exportation and importation of intoxicating liquor would necessarily have the effect of repealing Section 3, of Title 2, of the National Prohibition Act, providing that "liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the Commissioner may, upon application, issue permits therefor, etc." (The National Prohibition Act, 41 Stat., 305.) The imposition of "absolute prohibition" would also repeal Section 4, of Title 2, of the National Prohibition Act. Section 4 provides that "the articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this act if they correspond with the following descriptions and limitations, etc." Denatured alcohol or denatured rum, medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia, National Formulary or the American Institute of Homeopathy unfit for use for beverage purposes, patented, patent and proprietary

medicines that are unfit for use for beverage purposes, toilet, medicinal and antiseptic preparations and solutions that are unfit for use for beverage purposes, and flavoring extracts and syrups that are unfit for use as a beverage, or for intoxicating beverage purposes, as well as vinegar and preserved sweet cider are enumerated in Section 4 immediately following the language "if they correspond with the following descriptions and limitations." "Absolute prohibition" would necessarily repeal Title 3 of the National Prohibition Act, governing the manufacture, sale, transportation, exportation and importation of alcohol for industrial purposes. In short, there would be nothing left of the National Prohibition Act and the act supplemental thereto except the prohibitory provisions if "absolute prohibition" were imposed by a state or city in the exercise of its police power in the enforcement of the Eighteenth Amendment of the Federal Constitution. More than this, the permissive provisions of Regulations 60, for the enforcement of Title 2 of the National Prohibition Act, and the permissive provisions of Regulations 61, for the enforcement of Title 3, of the National Prohibition Act, would be repealed if a state or city exercised the power to impose "absolute prohibition" of "intoxicating liquors," as defined in the National Prohibition Act.

It is further respectfully suggested that legal obligations have been imposed upon the registered pharmacists of the United States, as well as upon the qualified physicians, to dispense and prescribe, respectively, intoxicating liquor for medicinal purposes, in the quantity and manner provided in the National Prohibition Act, the act supplemental thereto, and the regulations for their enforcement. How may these legal obligations to the public be discharged by registered pharmacists and qualified physicians if a state or city in the exercise of its police power imposes "absolute pro-

hibition" on the sale of alcoholic liquor for medicinal purposes? How may the citizens of the United States and of the several states obtain alcoholic liquor for medicinal and industrial purposes, as sanctioned by the Eighteenth Amendment to the Federal Constitution, the National Prohibition and the act supplemental thereto, if a state or city exercises its police power to impose "absolute prohibition" of the manufacture, sale, transportation, exportation, or importation of intoxicating liquors? Can it reasonably be contended that the imposition of "absolute prohibition" by a state, or city, or even Congress, constitutes "appropriate legislation" to enforce the Eighteenth Amendment to the Federal Constitution, as provided in the amendment itself?

E. C. BROKMEYER,
General Attorney,
National Association of Retail Druggists.

68TH CONGRESS
1st Session

SENATE

DOCUMENT
No. 44

STATEMENT AND RECOMMENDATIONS

PREPARED FOR THE

BUREAU OF INTERNAL REVENUE DEPARTMENT OF THE TREASURY

BY ITS

ALCOHOL TRADES ADVISORY COMMITTEE

APPOINTED BY THE COMMISSIONER OF INTERNAL REVENUE IN RESPECT TO THE ADMINISTRATION OF THE NATIONAL PROHIBITION ACT

PRESENTED BY MR. BAYARD

FEBRUARY 13, 1924.—Ordered to be printed with an illustration

WASHINGTON
GOVERNMENT PRINTING OFFICE
1924

STATEMENT AND RECOMMENDATIONS OF THE ALCOHOL TRADES ADVISORY COMMITTEE.

The alcohol trades advisory committee, appointed April 27, 1923, by the Commissioner of Internal Revenue in respect to the administration of the national prohibition act, with particular reference to the manufacture, transportation, sale, and use thereunder of alcohol for other than beverage purposes, respectfully submits these views and recommendations.

The following statement made in its official report by a joint select committee of Congress is fully as true now as the day it was written—over 25 years ago—particularly when it is considered that in the World War the production of nonbeverage alcohol was rated as one of the "key" industries of the Nation:

> The uses of alcohol other than as a beverage are more largely and widely extended than is generally supposed. But while the use of alcohol as a beverage is purely voluntary its employment for all other purposes is legitimate, beneficial, and necessary. No article entering into manufacture or the arts, whether of domestic or foreign production, performs more legitimate or beneficial functions. There is scarcely a manufacturer in the country who does not use alcohol in the production of his goods to a greater or less extent. (Rept. No. 411, 55th Cong., Dec. 17, 1897.)

The alcohol referred to by that committee is ethyl alcohol—unquestionably the most important of all the alcohols which have been of industrial and scientific utilization; in fact, it is considered in those respects to be second only to water. Generally speaking, there can be no great development of chemical industry without alcohol any more than there could be a steel industry without pig iron, an electric industry without copper, or a fertilizer industry without potash and fixed nitrogen. While alcohol may not be used directly in the manufacture of textiles, automobiles, and innumerable other ordinary articles of commerce, any chemist could draw a flow sheet to show the relation of alcohol to the units assembled in the fabrication of the finished products.

Prior to the passage of the tax-free denatured alcohol act of June 7, 1906, comparatively little alcohol was used for industrial purposes, or in broad-gauge scientific research, for the reason that a prohibitory tax was imposed and collected thereon regardless of its nonbeverage utilization. (A tax of approximately $4.18 per liquid gallon still attaches to pure alcohol used in medicines, flavoring extracts, and certain other nonbeverage products, and even to that required for ordinary commercial laboratory purposes.) Despite handicaps, the nonbeverage use of alcohol—pure and denatured—has grown to healthy proportions, as will be shown by the official governmental statistics. Those figures, however, pale into insignificance when compared with the production and use of alcohol for industrial purposes in European countries. As an illustration, for many years preceding

the World War Germany produced and used, for other than beverage purposes, an average of about 100,000,000 gallons annually. In connection with the development of industrial alcohol in Germany, it may be interesting, at least from a historical standpoint, to note the following extract from an article written upon his return from that country, by the late Commissioner of Internal Revenue, John G. Capers, published in Harper's Weekly, October 3, 1908:

> Industrial alcohol is a matter of nearly as much concern to the German Empire as its army and navy; in fact, the elder Emperor inaugurated the industry for the primary purpose of having a source of light, heat, and power within the Empire independent of petroleum products, of which Germany has none. That wise old Emperor, realizing that some day his empire might be forced, in time of war, to be self-dependent and resourceful within its own borders, determined to be independent of petroleum products, all of which were and still are shipped into Germany from other countries, and an elaborate paternal system was inaugurated, to insure as the Government's ultimate safety source of light, heat, and power the alcohol which would be produced from the German potato, now so carefully cultivated for that purpose, as it has been for nearly 40 years.

While the future uses of alcohol will be coextensive with the progress of chemical industry, there are a few uses the expansion of which will be more or less revolutionary in character, such as in the perfection of liquid motor fuels to supplement the rapidly diminishing supply of petroleum suitable for the purpose, and other adaptations which are at this time the subject of practical experimentation and scientific research.

From where is the essential future supply of alcohol for governmental, industrial, and scientific purposes to come? Under present conditions of prohibition law enforcement we have real cause to be concerned.

Alcohol is a basic chemical required in the production of smokeless powder, trinitrotoluol, cordite, and like explosives, poison gases, airplane "dope," and other war materials, in addition to its essential use in hospital supplies, etc. Moreover, according to many experts of world-wide authority, alcohol, in admixture with other compounds, will furnish the ideal future fuel for aircraft and other internal-combustion engines demanded by the Army and Navy; in fact, alcoholic fuels which have met every practical test to which they have been subjected are now being produced and used in the United States. Such alcoholic fuels do not require a specially designed engine, the standard motors and accessories being used with excellent results. Some of the advantages of such alcoholic fuels over gasoline may be summarized—more complete combustion, no preignition, no knocking, more uniform application of power, better control, and greater mileage.

The maximum capacities of all existing alcohol plants are now approximately one-half of what were available at the termination of the World War—and they were then deemed inadequate to meet the demand for munitions alone. How does this condition of affairs fit in with the program of national preparedness? The Washington Post of Wednesday, October 10, 1923, contained the following pertinent editorial:

> INDUSTRIAL PREPAREDNESS.
>
> The War Department's effort to work out a plan for the cooperation of industry with the armed forces with the greatest possible speed and effectiveness in time of war is along a line of preparedness that must be followed if America's defense

is to meet the demands of national safety. The Nation's experience in the World War proved the costliness of the lack of such a cooperative plan That it may profit by the lesson then learned, by safeguarding itself against repetition of the confusing and impeding conditions that marked the mobilization of industrial resources for military use in that conflict, is the purpose of the War Department's plan.

That Congress foresaw the difficulties of chemical research and industrial development under a law prohibiting the manufacture, sale, and use of intoxicating liquors for beverage purposes, is well demonstrated in the wording of the very title of the national prohibition act and in the care taken to prescribe a separate and special title of said act, under which the alcohol therein specifically defined was to be thereafter manufactured, transported, sold, and used for all nonbeverage purposes. Expressed differently, Congress provided, by Title III of said act, a complete basic code which, if intelligently and justly followed, would have freed industrial alcohol from the absurd distinctions, unwarranted restrictions, and almost intolerable conditions which surround its utilization for nonbeverage purposes under past and current methods of prohibition-law enforcement. The congressional mandate in that behalf is well stated in section 13 of that title, viz:

SEC. 13. The commissioner shall from time to time issue regulations respecting the establishment, bonding, and operation of industrial alcohol plants, denaturing plants, and bonded warehouses authorized herein, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose upon the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products.

How has the national prohibition act been administered with respect to industrial alcohol?

Spelling out authority for his action (apparently under the provisions of sec. 38, Title II, of said act), a former commissioner of internal revenue created the office of Federal prohibition commissioner, the incumbents of which have been clothed with full authority to enforce both the prohibitory and permissive features of the law. Such prohibition commissioners have sought to accomplish that task through a specially organized staff of prohibition enforcement officers, under a complicated system of regulations incorporated in what are known as Regulations 60 and Regulations 61. Not only was no provision made for a properly trained industrial alcohol administrator to enforce apart from but in cooperation with a prohibition officer, the provisions of Title III concerning alcohol lawfully manufactured and withdrawn for scientific research and industrial purposes, but in the preparation of such regulations a remarkable distinction was made between tax-paid alcohol, on the one hand, and tax-free and denatured alcohol, on the other, although in practical effect all such alcohol was intended for scientific, industrial, governmental, and other nonbeverage purposes.

As an illustration, tax-paid alcohol required for medicines, flavoring extracts, and certain other nonbeverage commodities was placed under Regulations 60 in the same category with whisky and other potable liquors, and could only be procured by permittees after vexatious and costly delays, through inexperienced "prohibition

directors;" while tax-free ethyl alcohol and denatured alcohol only were placed under Regulations 61 and were obtainable by permittees through collectors of internal revenue, the extensive experience of whose officers in connection with governmental control of distilled spirits equipped them intelligently and promptly to meet the requirements of legitimate trade. The fundamental error in making such an invidious distinction in regulations between alcohols intended for lawful purposes, instead of having the manufacture, transportation, sale, and use of all such alcohol administered under Title III of the law and Regulations 61, in logical furtherance of the intent of Congress, is largely responsible for the opposition of legitimate industry to the present method of prohibition law enforcement, which makes a police officer the source of supply of essential raw material, or any other scheme by which a prohibition commissioner shall say how, when, from whom, and in what quantities alcohol shall be secured for lawful purposes.

In our opinion, the fault does not lie with the law, but in the administration thereof. We yield to no one in our adherence to the principle of law enforcement, but surely the national prohibition act can be so administered as not to interfere with the health, economic needs, and the national defense of the country, although this is apparently challenged by some "dry" advocates. For instance, Mr. Wayne B. Wheeler, general counsel of the Anti-Saloon League of America, before the Committee on the Judiciary of the House of Representatives, on Friday, May 20, 1921, made the following remarkable statement:

> If it comes to the point where it must be a choice between medicaments for medical preparations and the enforcement of the law, I think we must choose law enforcement.

In placing the administration of the legitimate use of alcohol in the hands of a prohibition commissioner without suitable technical knowledge, training, nor experience, and perchance being out of sympathy with that phase of the law, the Government disregarded the lawful status of the chemical, alcohol, and it is therefore not surprising that such prohibition commissioner and his forces acted as they did and are doing, because they do not understand the relationship of alcohol to the defense, health, and general welfare of the Nation and to the progress of science. Some fanatics have, in fact, seriously proposed as the best method of enforcing the eighteenth amendment to the Constitution to prohibit altogether the manufacture of alcohol, while others advocate the use of a "substitute," when, notwithstanding long-continued, serious research, there is no substance known to science or industry which can possibly take the place of alcohol. No rational person would seriously contend that a chemist or merchant would go through the humiliating, tedious, and costly experience of obtaining and using alcohol and be treated as a suspicious character if he could possibly get along without it.

The one redeeming feature which science and industry find in the present method of administering the legitimate manufacture and use of alcohol through a prohibition commissioner is the right of appeal to the Commissioner of Internal Revenue and the Secretary of the Treasury. This was emphatically demonstrated at a hearing before the Committee on the Judiciary of the House of Representatives on

February 19, 1923, on the so-called Ernst-Wood bill (H. R. 12035; S. 3713). That measure sought to create a separate bureau of government, under a "commissioner of prohibition," who would be independent of the time-honored departmental control and answerable for his acts solely to the President, and to confer upon that official autocratic powers to enforce the entire group of laws—punitive and taxing—having to do with the manufacture, sale, and use of intoxicating liquors (in which high-proof alcohol has been included), narcotic drugs, etc. Among those who appeared in opposition to and filed written protests against the bill may be mentioned the American Chemical Society, composed of approximately 15,000 highly trained chemists, all of whom have had ample opportunity to judge of the prohibition commissioner's work as applied to legitimate industry; National Drug Trade Conference, Manufacturing Chemists' Association, American Drug Manufacturers Association, Flavoring Extract Manufacturers' Association, National Wholesale Druggists' Association, National Association of Retail Druggists, American Pharmaceutical Association, the Proprietary Association, American Manufacturers of Toilet Articles, Faculties of Pharmaceutical Colleges, and others interested in science and legitimate industry.

It will be readily appreciated that the protestants against the Ernst-Wood bill represented investments of many millions of dollars and vast numbers employed in their respective fields. The committee failed even to report such bill and it died with the Sixty-seventh Congress.

Resort is now being had to propaganda seeking to place upon the Secretary of the Treasury and the Commissioner of Internal Revenue responsibility for alleged failure properly to enforce the provisions of the national prohibition act, and which apparently has for its ultimate object a further appeal to Congress for the enactment of a law embodying the principle of the Ernst-Wood bill. We unhesitatingly characterize these attacks upon the Secretary of the Treasury and the Commissioner of Internal Revenue as being as unfair as unwarranted, both of those officials having but properly and justly exercised their statutory right of review. Time after time, upon appeals of science and industry, they promptly accorded relief from intolerable conditions.

The attitude of a prohibition commissioner toward science and industry is sufficiently shown by an official bulletin issued on October 28, 1922, in which he stated that—

> Effectiveness of enforcement is shown by results in curtailing the source of supply of whisky for medicinal use and grain alcohol for industrial and drug purposes, such curtailment being reflected in the reduction of tax-paid withdrawals of alcohol as measured in tax gallons.

This statement was reprinted in newspapers throughout the country and undoubtedly created great prejudice in the public mind against the alcohol using industries.

The alcohol trades advisory committee condemns, as a pernicious handicap to scientific research and lawful industry and contrary to long-established practice under our system of government, any such proposal as that contemplated by the Ernst-Wood bill; and the proponents of such a bureaucracy may be assured that it will be opposed with every ounce of energy that can be put forward by those engaged

in lawful professions and businesses in which the chemical, alcohol, is required and used.

In view of the facts and conditions, we respectfully submit the following recommendations:

I. As alcohol is admittedly a basic chemical essential to our national defense, industrial and economic development, and even to the advancement of civilization itself, all who believe in true law enforcement should recognize the insufferable situation to which chemical industry has been brought by failure heretofore properly to enforce the industrial alcohol features of the national prohibition act, and should make certain that it is administered as intended by Congress.

II. The alcohol trades advisory committee believes that the action of a former Commissioner of Internal Revenue in vesting in a Federal prohibition commissioner, not equipped with the essential technical and economic knowledge and training, the duties of carrying out the provisions of the national prohibition act, concerning the manufacture, transportation, sale, and use of industrial alcohol, was illegal by implication, illogical by any method of sound reasoning, economically impracticable, and should be forthwith corrected.

The Commissioner of Internal Revenue should designate a Deputy Commissioner of Internal Revenue, or appoint an industrial alcohol commissioner, to take over the administration of that portion of the law relating to the manufacture, sale, and use of high proof alcohol, pure and denatured, for nonbeverage purposes. Collectors of internal revenue and civil service revenue officers should be selected to assist him, as is customary in the enforcement of other internal revenue statutes. It follows that such deputy or industrial alcohol commissioner should possess suitable technical knowledge, training, and experience. It should be his duty to issue permits to manufacture, withdraw, and use industrial alcohol of any kind, a copy of each permit at the time of issuance to be delivered to the prohibition commissioner so that he might police operations. In this way, efficient and scientific administration would be assured and at the same time the prohibition commissioner would be relieved from routine work incidental to serving legitimate industry, and could devote the necessary time to his logical duty of enforcing the prohibitory features of the law. Furthermore, the two agencies, coordinating, would be a check upon each other. It would not require any change whatsoever in the law, but merely a revision of Regulations 60 and 61, to carry this recommendation into effect.

III. If agreeable to the Commissioner of Internal Revenue, this alcohol trades advisory committee will act in an advisory capacity for the purpose of assisting such Deputy Commissioner of Internal Revenue or industrial alcohol commissioner in investigating applications for permits and furthering the uses of alcohol in scientific research and lawful industry.

Respectfully submitted.

ALCOHOL TRADES ADVISORY COMMITTEE.
By WM. A. SAILER, *Chairman.*
H. E. HOWE, *Secretary.*

APPENDIX.

ALCOHOL TRADE ADVISORY COMMITTEE.

Appointed by the Commissioner of Internal Revenue in respect to the administration of the national prohibition act:

William A. Sailer, Baltimore, Md., chairman; secretary and general manager, Sharp & Dohme, Baltimore, Md.; representing American Drug Manufacturers' Association.

H. E. Howe, Washington, D. C., secretary; editor, Industrial and Engineering Chemistry; representing American Chemical Society.

W. J. Schieffelin, New York, N. Y.; president, Schieffelin & Co., New York, N. Y.; representing National Wholesale Druggists' Association.

Samuel C. Henry, Chicago, Ill.; president, National Drug Trade Conference; representing National Association of Retail Druggists.

J. H. Beal, Urbana, Ill.; chairman of board of trustees, U. S. Pharmacopeia; emeritus professor of pharmacy, University of Pittsburgh; representing American Pharmaceutical Association and Faculties of Pharmaceutical Colleges.

Martin H. Ittner, Jersey City, N. J.; chief chemist, Colgate & Co., Jersey City, N. J.; representing American Manufacturers of Toilet Articles.

Frank A. Blair, New York, N. Y.; vice president, The Centaur Co., New York, N. Y.; representing The Proprietary Association.

M. C. Whitaker, New York, N. Y.; president, U. S. Industrial Chemical Co., New York, N. Y.; Perkin Medalist, 1922.

R. H. Bond, Baltimore, Md.; vice president and general manager, McCormick & Co., Baltimore, Md.; representing Flavoring Extract Manufacturers' Association.

Charles L. Reese, Wilmington, Del.; chemical director, E. I. du Pont de Nemours & Co., Wilmington, Del.; representing Manufacturing Chemists' Association.

R. M. Cain, Indianapolis, Ind.; president and general manager, Swan-Myers Co., Indianapolis, Ind.; representing American Pharmaceutical Manufacturers' Association.

H. S. Chatfield, New York, N. Y.; vice president, Kasebier-Chatfield Shellac Co., New York, N. Y.; representing the National Paint, Oil, and Varnish Association.

LAWFUL USES OF ALCOHOL.

Aside from the ordinary uses of pure alcohol for Governmental, medicinal, scientific, and industrial purposes, the Government has prescribed formulæ of denatured alcohol and issued permits for the use thereof in the manufacture of the following articles:

Acetaldehyde; acetanilide; acetic ether; acetphenetidin; aconite; adeps lanæ; aletrin; alkaloids and alkaloid salts (39–A); aloin; ammunition; antipyrine; apocynin; arbutin; artificial flowers and feathers; asclepiadin; aspirin; atophan; avenin; analytical work; arabinose.

Barometer and thermometer tubes; benzaldehyde; benzidine; benzoic acid; benzon; benzyl cyanide; betanaphthol; beta-naphthol benzoate; beta-naphthol salicylate; composition billiard and pocket balls; bottle caps; brushes; benzoin; benzol; camphor synthetic; cements; chelonin; chloral hydrate; chloroform; cimicifugin; cocoa butter; collodion; collodion corn remedy; coros and bronze powders; compasses; concentrations (non-liquid); coumarin; creosote carbonate; cutlery; caustic potash; confectioners' colors; dandelion.

Dental alloy; diethylaniline; digestive ferments; digitalis; dimethylglyoxime; dinitrotoluene; disinfectant germicide; door checks; dyestuffs; dextrin; dextrose; embalming fluid; enamel; eosine; essential oil orris; ether; ethyl acetate; ethyl aniline; ethyl bromide; ethyl butyrate; ethyl chloride; ethyl propionate; extracting glycerin from distillery slop; fertilizers; filaments for incandescent lamps; formaldazone; formaldehyde; fireworks; fulminate of mercury; gaduol; gallocyanine; gas mantles; gentian (solid extract); glycerophosphates; guaiacol; guaiacol carbonate; gelatin capsules; gum and pyroxlin solutions; galactose.

Glass; glass enamel; hats; heliotropin; hexachlorobenzol; hydrastis (alkaloid of); imitation ivory goods; imitation leather; ink; inulin; iriscin; isinglass; insecticides; jalapin (non-liquid concentrations of); japans; jewelry; lacquers, pastes, and varnishes from soluble cotton; leather goods finish; leather substitutes; liquor cresolis compound; levulose; lysol; mandrake (powdered and solid extract of); mica insulators; mirrors; moldings and picture frames; monobromated camphor; moth repellant.

Motor fuel; mucilage; maltose; mannose; mannite; metol; melibiose; paste; glue; nitrocellulose (solution and solvent of); nitroso-beta-naphthol; non-scattterable glass; oils, greases, lubricants, and soluble thread-cutting oils; oleoresins; orthotoluolsulfamid; optical goods; paints; paraffin; pepsin and similar products; phenolphthalein; phenyl-cinchoninic acid; photographic engravings; photographic dry plates; photographic films; phytolacin (concentration of); podophyllin resin and similar products; polish preparations for metals and furniture; postal card colors; potassium hydroxide; powdered drugs and extracts.

Print paper and enlargements; pyroxylin cements; paramidophenol; pencils; paper; plumbing material; potassium cyanate; refining mineral oils; refining precious metals; resin of scammony; resorcin; raffinose; resins; rhamnose; saccharin, salicylic acid; salicylic aldehyde; salol; salophen; santonin and strychnine; saponin; shampoo jelly; shampoo liquid; shellac thinner.

Shellac varnish; shoe polish; silk fabrics; silverware and bronze; smokeless powder; soap liquid; soap transparent; sodium benzoate; soldering flux; solid extracts; solidified alcohol; stains; stencil paper; sterilizing solution for corks; sulphonic acid; surgical ligatures; synthetic mustard oil; saccharose; sorbit; solution and solvent of nitrocellulose; stanolind; synthetic perfume bases; tannic acid; terpine hydrate; textile cleansing soap; theobromine; thermostatic devices; tinfoil; toludin; transparent paper.

Transparent soap for waterproofing cement; trinitrotoluol; tobacco; trehalose; trioxyaline; uric acid; varnish remover; viburnum (concentration); vegetable colors; washing lenses; water colors; watches; wood filler; wood finish; wool fat; waterproof fiber signs; xylose.

Celluloid, pyralin, and similar products; nitrocellulose lacquer; cement products.

Arsphenamine; beta-naphtha centrallites; diethyl barbituric acid (barbital); diamidophenol; diethylphthalate; dimethylsulphate; ethyl esters of cinnamic, lauric, benzoic, and pelargonic acids; ethyl palmitate; ethyl sulphate (for use in manufacture of acetphenetidin); hydroquinone; ketone Michelers.

Lacquers; laboratory experiments; metol; neoarsphenamine; nitrous ether; phenacetin; paramidophenol; phenylacetic acid; picric acid testfor United States Government; powdered chemicals; synthetic camphor; viscaloid; white petroleum oils; ethyl sulphate.

Cutting oils; shampoo; deodorants; experimental purposes; disinfectants; furniture polish; films; gradometers; photographic emulsions; solution of aniline dyes for industrial purposes (except certified food colors); esters.

Liquid soap; smelling salts; toilet preparations.

Cigars and cigarettes.

Fungicides, insecticides, and substances of a similar nature.

Photo enlargements; photo prints; photo-engraving; photographic collodion.

Dichlorethane; parafulminate of mercury; paraphenetidin; hydroquinone.

Fine chemicals; sulphonmethane.

Purification of rubber; santonine.

Hydrosulphate; sodium.

Soluble cotton.

Hydrazoanisol; milk protein; paranitrophenatol; refining potassium and sodium hydrate; saponification of the waxes of acid-fast bacteria; ethyl ester; dye intermediates; imitation rubber; lacquer solutions; urea; anhydrous soap; sutures and ligatures; tubes (collapsible); sanatogen; citronellol; geraniol.

Celery oil; certified food colors; chemical preparations; dry extracts for food products; ethereal oil; neosalvarsan; protargentum, sodium ethyl sulphate; sulphuric ether; salvarson.

Nitrous ether; pure acetic ether.

Adalin; by-products from distillery slop; lacquers for food containers; ammonium; benzonaphthol; codeine; diacetylmorphine; ethyl morphine; homatropin; morphine salicylate; cocaine; strontium; sajodin; veronal.

Ethylene gas.

Acetate of lime; acetone; vinegar.

Artificial silk; backing of films; iodizers; photo films.

Preserving formaldehyde, U. S. P.

Liniments and lotions, for external use only.

Solid and powdered extracts.

Phenacetin; ethyl valerate.

Tincture of iodine, U. S. P.; tr. iodi Fortier, N. F.; tr. iodine Churchill's; tr. iodine 3½ per cent.

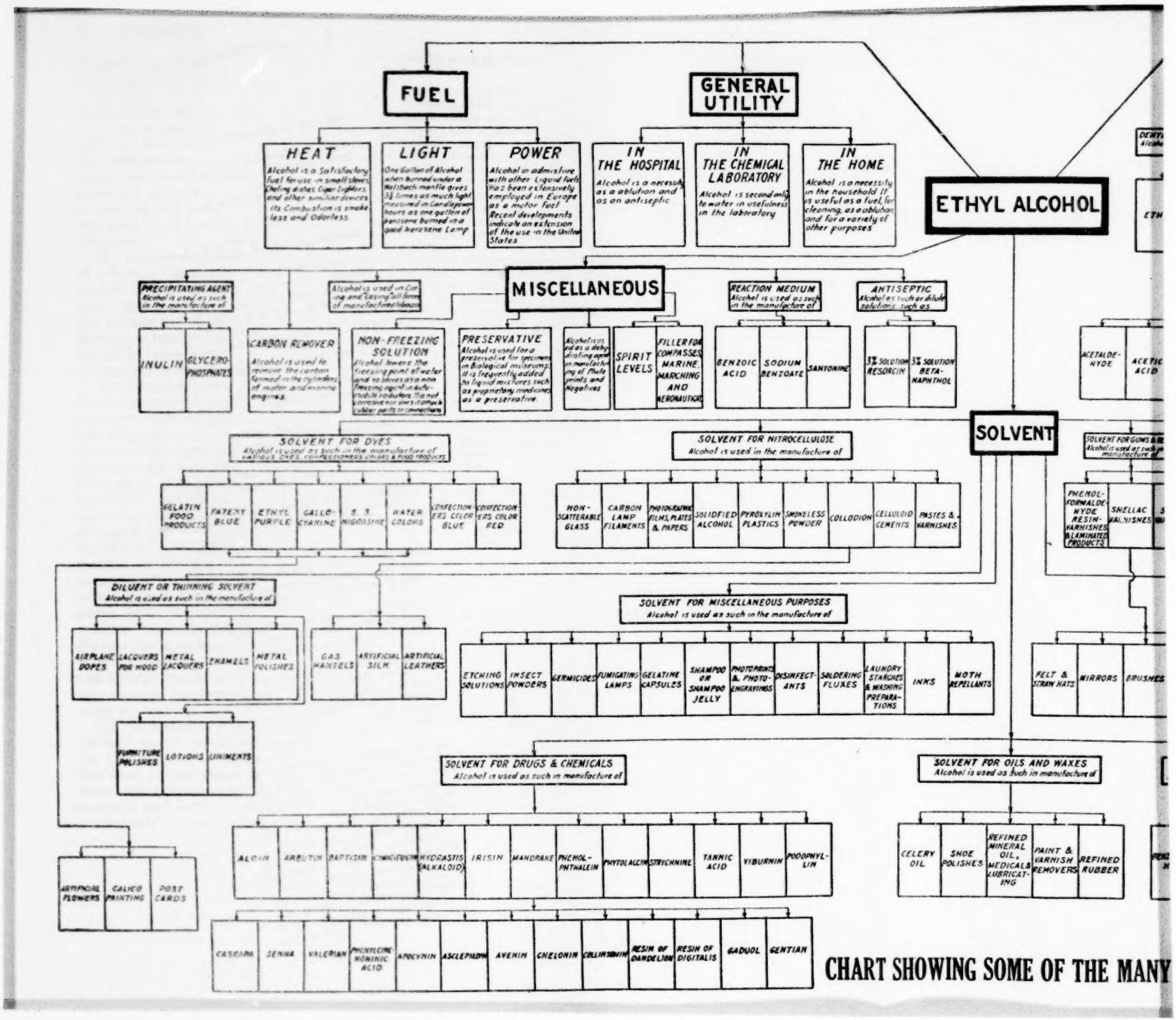
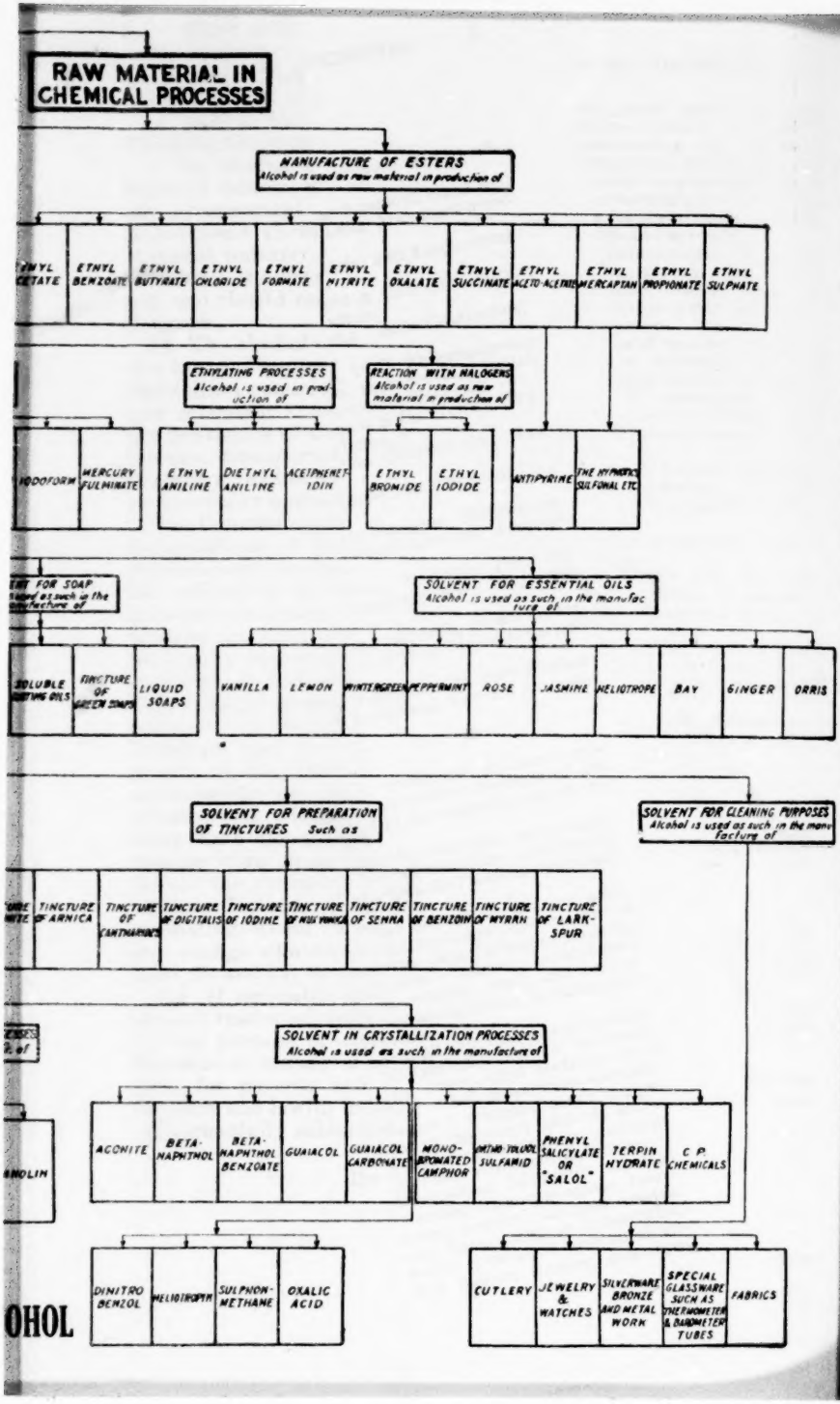

ETHYL ALCOHOL
FUEL
GENERAL UTILITY
HEAT
Alcohol is a Satisfactory fuel for use in small stoves, Chafing dishes, Cigar Lighters, and other similar devices. Its Combustion is smokeless and Odorless.
LIGHT
One Gallon of Alcohol when burned under a Welsbach mantle gives 3½ times as much light measured in Candlepower hours as one gallon of kerosene burned in a good kerosene Lamp
POWER
Alcohol in admixture with other Liquid fuels has been extensively employed in Europe as a motor fuel. Recent developments indicate an extension of the use in the United States
IN THE HOSPITAL
Alcohol is a necessity as a ablution and as an antiseptic
IN THE CHEMICAL LABORATORY
Alcohol is second only to water in usefulness in the laboratory
IN THE HOME
Alcohol is a necessity in the household It is useful as a fuel, for cleaning, as a ablution and for a variety of other purposes
MISCELLANEOUS
PRECIPITATING AGENT Alcohol is used as such in the manufacture of
INULIN
GLYCEROPHOSPHATES
CARBON REMOVER
Alcohol is used to remove the carbon formed in the cylinders of motor and steaming engines.
NON-FREEZING SOLUTION
Alcohol lowers the freezing point of water and so serves as a non Freezing agent in duly-proportioned radiators. It is not corrosive nor does it attack rubber parts in connections
PRESERVATIVE
Alcohol is used for a preservative for specimens in Biological museums. It is frequently added to liquid mixtures such as proprietary medicines as a preservative.
Alcohol is used as a dehydrating agent in manufacturing of Photo prints and Negatives
SPIRIT LEVELS
FILLER FOR COMPASSES MARINE, MARCHING AND AERONAUTICS
REACTION MEDIUM Alcohol is used as such in the manufacture of
BENZOIC ACID
SODIUM BENZOATE
SANTONINE
ANTISEPTIC Alcohol as such or dilute solutions such as
5% SOLUTION RESORCIN
3% SOLUTION BETA-NAPHTHOL
ACETALDEHYDE
ACETIC ACID
SOLVENT
SOLVENT FOR DYES Alcohol is used as such in the manufacture of various DYES, CONFECTIONERS COLORS & FOOD PRODUCTS
GELATIN FOOD PRODUCTS
PATENT BLUE
ETHYL PURPLE
GALLOCYANINE
S. S. NIGROSINE
WATER COLORS
CONFECTIONERS COLOR BLUE
CONFECTIONERS COLOR RED
SOLVENT FOR NITROCELLULOSE Alcohol is used in the manufacture of
NON-SCATTERABLE GLASS
CARBON LAMP FILAMENTS
PHOTOGRAPHIC FILMS, PLATES & PAPERS
SOLIDIFIED ALCOHOL
PYROXYLIN PLASTICS
SMOKELESS POWDER
COLLODION
CELLULOID CEMENTS
PASTES & VARNISHES
PHENOL-FORMALDEHYDE RESIN-VARNISHES & LAMINATED PRODUCTS
SHELLAC VARNISHES
DILUENT OR THINNING SOLVENT Alcohol is used as such in the manufacture of
AIRPLANE DOPES
LACQUERS FOR WOOD
METAL LACQUERS
ENAMELS
METAL POLISHES
FURNITURE POLISHES
LOTIONS
LINIMENTS
GAS MANTELS
ARTIFICIAL SILK
ARTIFICIAL LEATHERS
SOLVENT FOR MISCELLANEOUS PURPOSES Alcohol is used as such in the manufacture of
ETCHING SOLUTIONS
INSECT POWDERS
GERMICIDES
FUMIGATING LAMPS
GELATINE CAPSULES
SHAMPOO OR SHAMPOO JELLY
PHOTOPRINTS & PHOTO-ENGRAVINGS
DISINFECTANTS
SOLDERING FLUXES
LAUNDRY STARCHES & WASHING PREPARATIONS
INKS
MOTH REPELLANTS
FELT & STRAW HATS
MIRRORS
BRUSHES
SOLVENT FOR DRUGS & CHEMICALS Alcohol is used as such in manufacture of
ALOIN
ARBUTIN
BAPTISIN
CIMICIFUGIN
HYDRASTIS (ALKALOID)
IRISIN
MANDRAKE
PHENOLPHTHALEIN
PHYTOLACCIN
STRYCHNINE
TANNIC ACID
VIBURNIN
PODOPHYLLIN
CASCARA
SENNA
VALERIAN
PHENYLCINCHONINIC ACID
APOCYNIN
ASCLEPIADIN
AVENIN
CHELONIN
COLLINSONIN
RESIN OF DANDELION
RESIN OF DIGITALIS
GADUOL
GENTIAN
SOLVENT FOR OILS AND WAXES Alcohol is used as such in manufacture of
CELERY OIL
SHOE POLISHES
REFINED MINERAL OIL, MEDICAL & LUBRICATING
PAINT & VARNISH REMOVERS
REFINED RUBBER
ARTIFICIAL FLOWERS
CALICO PRINTING
POST CARDS

CHART SHOWING SOME OF THE MANY


RAW MATERIAL IN CHEMICAL PROCESSES
MANUFACTURE OF ESTERS
Alcohol is used as raw material in production of
ETHYL ACETATE
ETHYL BENZOATE
ETHYL BUTYRATE
ETHYL CHLORIDE
ETHYL FORMATE
ETHYL NITRITE
ETHYL OXALATE
ETHYL SUCCINATE
ETHYL ACETO-ACETATE
ETHYL MERCAPTAN
ETHYL PROPIONATE
ETHYL SULPHATE
ETHYLATING PROCESSES
Alcohol is used in production of
REACTION WITH HALOGENS
Alcohol is used as raw material in production of
IODOFORM
MERCURY FULMINATE
ETHYL ANILINE
DIETHYL ANILINE
ACETPHENETIDIN
ETHYL BROMIDE
ETHYL IODIDE
ANTIPYRINE
THE HYPNOTICS SULFONAL ETC.
SOLVENT FOR ESSENTIAL OILS
Alcohol is used as such in the manufacture of
SOLUBLE CUTTING OILS
TINCTURE OF GREEN SOAPS
LIQUID SOAPS
VANILLA
LEMON
WINTERGREEN
PEPPERMINT
ROSE
JASMINE
HELIOTROPE
BAY
GINGER
ORRIS
SOLVENT FOR PREPARATION OF TINCTURES Such as
SOLVENT FOR CLEANING PURPOSES
Alcohol is used as such in the manufacture of
TINCTURE OF ARNICA
TINCTURE OF CANTHARIDES
TINCTURE OF DIGITALIS
TINCTURE OF IODINE
TINCTURE OF NUX VOMICA
TINCTURE OF SENNA
TINCTURE OF BENZOIN
TINCTURE OF MYRRH
TINCTURE OF LARKSPUR
SOLVENT IN CRYSTALLIZATION PROCESSES
Alcohol is used as such in the manufacture of
ACONITE
BETA-NAPHTHOL
BETA-NAPHTHOL BENZOATE
GUAIACOL
GUAIACOL CARBONATE
MONO-BROMATED CAMPHOR
ORTHO TOLUOL SULFAMID
PHENYL SALICYLATE OR "SALOL"
TERPIN HYDRATE
C. P. CHEMICALS
DINITRO BENZOL
HELIOTROPIN
SULPHONMETHANE
OXALIC ACID
CUTLERY
JEWELRY & WATCHES
SILVERWARE BRONZE AND METAL WORK
SPECIAL GLASSWARE SUCH AS THERMOMETER & BAROMETER TUBES
FABRICS

Soap liniment (U. S. P.) and chloroform liniment (U. S. P.), liniment of soft soap and green soap, when made in accordance with the standards of the United States Pharmacopœia, with the exception that the products will contain camphor and oil of rosemary.

Aldehydes; glacial acetic acid.

Chemical and physical laboratory purposes; photo dry plates; manufacturing vegetable oils; varnish and white petroleum oils.

Tooth poste.

Meat-branding inks.

Incorporating certified color in food products, no alcohol to appear in the finished product when prepared for use.

Acetparamidophenolsalol and candy glaze.

Pectin.

Antiseptic solutions, for external purposes.

Mouth washes and dentifrices.

Barbers' alcoholic supply preparations.

Perfumes, toilet waters.

Bay rum.

Solid confections and lozenges.

Emulsions which contain no alcohol in the finished products.

Spirit varnishes, varnish removers, and similar preparations.

An antiseptic, sterlizing, and bathing alcohol for use exclusively by visiting nurse associations, public nursing associations, clinics, and dispensaries.

Some general scientific and industrial uses of alcohol are outlined in the following chart:

HIXON *v.* OAKES.

ERROR TO THE DISTRICT COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA.

No. 420. Argued April 24, 1924.—Decided May 26, 1924.

A city ordinance forbidding the filling of prescriptions calling for more than eight ounces of alcoholic liquor, manifestly does not infringe any right of the pharmacist granted by the Eighteenth

Amendment or the National Prohibition Act and protected by the Fourteenth Amendment.
Writ of error to review 61 Cal. App. 200, dismissed.

ERROR to a judgment of the District Court of Appeal, of California, remanding the plaintiff in error, in a *habeas corpus* proceeding.

Mr. Ray E. Nimmo for plaintiff in error.

Mr. J. M. Friedlander and *Mr. S. W. Odell* for defendant in error.

Mr. E. C. Brokmeyer, by leave of Court, filed a brief as *amicus curiæ.*

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Plaintiff in error, a regularly licensed pharmacist, was convicted of violating, September 8, 1921, an ordinance of Los Angeles construed to forbid the filling of a prescription which called for more than eight ounces of alcoholic liquor.

After sentence, under permitted practice, he challenged the validity of the ordinance by a *habeas corpus* proceeding commenced in the District Court of Appeal upon the ground that it "is unconstitutional and void because it is in violation of the terms of the Eighteenth Amendment to the Constitution of the United States, and in violation of the terms of the National Prohibition Act," c. 85, 41 Stat. 305.

Having declared, "the single question presented for decision is whether the ordinance, insofar as it relates to the filling of prescriptions by licensed pharmacists, is valid and enforceable since the adoption of the Eighteenth Amendment and the enactment of the National Prohibition Law, commonly known as the Volstead Act,"

the District Court of Appeal affirmed the validity of the ordinance and remanded plaintiff in error. Thereupon he sued out this writ of error. The assigment of errors alleges a conflict between the ordinance and the Fourteenth as well as the Eighteenth Amendment.

The petition for *habeas corpus* did not mention the Fourteenth Amendment. The opinion of the court below indicates it was there maintained that Congress by the Volstead Act granted some right or privilege which is protected by the Fourteenth Amendment and may not be abridged by State or municipality.

We do not stop to decide whether, considering plaintiff in error's clear right through a new petition to secure from the Supreme Court of California an unembarrassed determination of the question presented below (*Matter of Zany*, 164 Cal. 724), the assailed judgment is one "in the highest court of a State in which a decision in the suit could be had," within § 237, Judicial Code. It is enough now to say that he has failed to raise any substantial federal question; and for that reason the writ of error must be dismissed. Neither the Eighteenth Amendment nor the Volstead Act grants the right to sell intoxicating liquors within a State. And certainly nothing in that act lends color to the suggestion that it endows a pharmacist with the right to dispense liquors for which he may claim the protection of the Fourteenth Amendment.

We go no further than to consider the points definitely raised upon the record and dispose of the present writ.

Dismissed.